Maryland Law Review

Volume 38 | Issue 2 Article 7

Survey of Maryland Court of Appeals Decisions

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THE INHERENT POWER OF JUDICIAL REVIEW AND CONSTITUTIONAL RESTRICTIONS ON ARBITRARY AND CAPRICIOUS ADMINISTRATIVE ACTION — *STATE DEPARTMENT OF ASSESSMENTS AND TAXATION v. CLARK*

Maryland courts have frequently claimed an inherent power to review and correct arbitrary, illegal, capricious, or unreasonable administrative decisions.[1] Recently, however, in *State Department of Assessments and Taxation v. Clark*,[2] the Maryland Court of Appeals restricted the scope of this power by finding that a circuit court did not have jurisdiction to determine whether administrative authority to reduce a real property assessment pursuant to article 81, section 67 of the Maryland Code was exercised in an arbitrary fashion.[3] The Court of Appeals held that the circuit courts' jurisdiction is limited to questions concerning the constitutionality of the administrator's actions.[4] *Clark* implicitly recognized that circuit courts

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1. *E.g.*, Zion Evangelical Luth. Church v. State Highway Admin., 276 Md. 630, 634-35, 350 A.2d 125, 128 (1976); Criminal Injuries Comp. Bd. v. Gould, 273 Md. 486, 500-01, 331 A.2d 55, 65 (1975); Baltimore Import Car Serv. v. Maryland Port Auth., 258 Md. 335, 342, 265 A.2d 866, 869-70 (1970) (dictum); State Ins. Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 300-01, 236 A.2d 282, 286 (1966) (dictum); Town of Dist. Heights v. County Comm'rs, 210 Md. 142, 146, 122 A.2d 489, 492 (1956) (dictum); Johnstown Coal & Coke Co. v. Dishong, 198 Md. 467, 473-74, 84 A.2d 847, 850 (1951); Hecht v. Crook, 184 Md. 271, 280-81, 40 A.2d 673, 677 (1945).

Inherent judicial power has been described in terms of: (1) powers that were not granted by the legislature, and that cannot be taken away by the legislature; (2) powers that are essential to the court's existence and protection; and (3) those powers essential to the due administration of justice. *See* State *ex rel.* Mahoney v. Superior Court, 78 Ariz. 74, 77-78, 275 P.2d 887, 889 (1954). The term "inherent judicial power" has been understood as "that which is essential to the existence, dignity and functions of the court from the very fact that it is a court." *In re* Integration of Neb. State Bar Ass'n, 133 Neb. 283, 287, 275 N.W. 265, 267 (1937). In analyzing this inherent power, the Nebraska court aptly stated that " '[t]he judicial power of this court has its origin in the Constitution, but when the court came into existence, it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not.' " *Id.* at 287, 275 N.W. at 267 (quoting *In re* Greathouse, 189 Minn. 51, 55, 248 N.W. 735, 737 (1933)). For additional cases describing inherent judicial power, see 20 AM. JUR. 2d *Courts* §§ 78 & 79 (1965). A thorough discussion on the scope of inherent judicial power is found in *In re* Clerk of Lyon County Courts, 308 Minn. 172, 241 N.W.2d 781 (1976).

2. 281 Md. 385, 380 A.2d 28 (1977).

3. *Id.* at 411, 380 A.2d at 42-43.

4. *Id.*

may continue to review administrative determinations in other contexts, but its analytic underpinnings suggest the possibility that such review might be destroyed for all administrative actions and raise serious problems pertaining to judicial checks on administrative determinations and the separation of powers in Maryland's system of government.

Fitzhugh and Geraldine Clark, appellees, owned a tract of land in Montgomery County, Maryland. In 1970 this tract was rezoned from rural-residential to multiple family, medium density. A year later this rezoning (combined with a general property reassessment) resulted in a more than tenfold increase in the property's assessment for the 1972 tax year.[5] The Clarks did not protest this reassessment, and it became final on January 1, 1972. In May of 1972, however, the Washington Suburban Sanitary Commission imposed a moratorium on new sewer extensions and hook ups in parts of Montgomery County, including the Clark land, effectively precluding its use for multiple family, medium density housing during the 1972 tax year.[6] Because the 1971 reassessment was based upon the availability of the Clark land for such use in 1972, the moratorium resulted in an overvaluation of the land for tax purposes in that year. The finality of the 1972 assessment prevented the Clarks from protesting the assessed value of the property through ordinary channels.[7] Article 81, section 67, however, provides a mechanism for reducing an assessment after it has become final if the reduction is approved by the county supervisor of assessments, the county director of finance, and the appeal tax court.[8]

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5. The land assessment increased from $12,640 for the taxable year 1971 to $132,150 for the taxable year 1972. Brief for Appellant State Dep't of Assess. & Taxation at 11, State Dep't of Assess. & Taxation v. Clark, 281 Md. 385, 380 A.2d 28 (1977).

6. The resolutions of the Washington Suburban Sanitary Commission restricted authorizations for sewer extensions and connections to the then existing sewer lines in Montgomery County. *Id.*

7. Article 81 of the Maryland Code (1975) contains a comprehensive procedure for challenging assessments. Under § 29(a), notice of the assessment is required and the opportunity to lodge a timely protest must be provided. A taxpayer may then, pursuant to § 255(a), request a hearing before the supervisor of assessments. A further hearing may be demanded before the property tax assessment board under § 255(b), and § 256 provides for appeal to the Maryland Tax Court. These administrative procedures are available as of right, provided the assessment is protested before the date of finality.

Upon exhaustion of administrative remedies, the taxpayer may appeal from the Tax Court to the county circuit court (or, in the case of Baltimore City residents, to the Baltimore City Court). MD. ANN. CODE art. 81, § 229(1) (Cum. Supp. 1977). Appeal may be taken to the Court of Special Appeals, *id.* § 229(p), and the Court of Appeals may be requested to review the Court of Special Appeals' decision. MD. CTS. & JUD. PROC. CODE ANN. § 12-201 (Cum. Supp. 1977).

8. At the time this litigation began, article 81, § 67 read in pertinent part:

> The final assessing authority [in Montgomery County, the Appeal Tax Court], the supervisor of assessments and the county treasurer (in Montgomery County the director of finance) of each county and in Baltimore City, the city solicitor, and the director of the department of assessments, . . . may by an

Pursuant to this provision, in August of 1972 the Clarks requested the Supervisor of Assessments for Montgomery County to grant them an abatement. The three assessing authorities decided upon a twenty-five percent reduction of the original assessment.

Dissatisifed with this result, the Clarks sought a declaratory judgment from the Montgomery County Circuit Court to enjoin the collection of taxes levied upon their property without providing them a rehearing on the question of the effect of the sewer moratorium on the property's value. They also sought a declaration that section 67 as it applied to them was unconstitutional in that it violated their equal protection and due process rights, and amounted to a taking without just compensation.[9] The case was decided on cross motions for summary judgment. First, the trial court held that it had jurisdiction over the case because of its inherent power to review administrative actions for arbitrariness, illegality, capriciousness, and unreasonableness.[10] It then found the administrative actions taken pursuant to section 67, which had resulted in the twenty-five percent abatement, were in fact arbitrary, capricious, and illegal.[11] The Court of Special Appeals agreed that the circuit court had jurisdiction to hear the case, but reversed the circuit court's determination that the abatement figure was arrived at arbitrarily[12] and remanded the case to the trial court for resolution of the

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order, decrease or abate an assessment after the date of finality for any year, whether the protest against said assessment was filed before the date of finality or not, in order to correct erroneous and improper assessments and to prevent injustice, provided, that such reasons for such decrease or abatement shall be clearly set forth in such order.

MD. ANN. CODE art. 81, § 67 (1975).

9. State Dep't of Assess. & Taxation v. Clark, 281 Md. 385, 390, 380 A.2d 28, 31-32 (1977).

10. The trial court reasoned that the legislature had no obligation to provide § 67 relief, but once it had decided to provide some relief, the inherent power of the court could be exercised to correct "abuses of discretion, and arbitrary, illegal, capricious or unreasonable acts." *Id.* at 397, 380 A.2d at 35.

11. The trial court found two instances of arbitrary action: (1) adoption of a 25% reduction without consideration of data pertinent to the Clarks' unique situation, and (2) selection of 25% as an abatement figure without consideration of the other county property affected by the moratorium. In other words, the abatement figure did not represent an average decrease in value. The supervisor of assessments explained that the reduction figure took into account a moratorium that would possibly last for three years. The supervisor utilized an 8% annual interest rate over this period to arrive at 25%. This figure was regarded by the trial court as being " 'without any basis in fact' " because: (1) the moratorium's duration was uncertain, and (2) the relationship of the 8% interest to the three-year period was "totally undemonstrated." State Dep't of Assess. & Taxation v. Clark, 34 Md. App. 136, 149-50, 367 A.2d 61, 77-79 (1976) (quoting the trial court), *aff'd*, 281 Md. 385, 380 A.2d 28 (1977).

12. Judge Lowe thought that the trial court had erred in granting the Clarks' motion for summary judgment on the issue whether the abatement was arbitrary as a matter of law. *Id.* at 150-52, 367 A.2d at 78-79. This conclusion was based on the Court of Special Appeals' belief that similar cases were reviewed; time prospects were considered; and an interest rate two percent above the maximum legal rate in

unaddressed constitutional issues. Before remand, a writ of certiorari was issued on petition of the appellants. The Court of Appeals did not reach the issue of arbitrariness, holding instead that the circuit court did not have jurisdiction over that issue.[13] The court then concluded that the circuit court had jurisdiction to decide whether the administrative determination was unconstitutional.[14] Rather than remand this question, the Court of Appeals examined the record to determine whether any constitutional violations had in fact taken place. Finding none, it remanded the case to the Court of Special Appeals to enter judgment in accordance with its opinion.

REVIEW TO CORRECT ARBITRARY, ILLEGAL, CAPRICIOUS, OR UNREASONABLE ADMINISTRATIVE CONDUCT

Judge Orth began his discussion of a court's power to review administrative determinations by pointing out that if a statute provides a special form of remedy for a specific type of case, the statutory remedy should be followed in lieu of a declaratory judgment proceeding.[15] He then discussed the statutory scheme for assessing the value of real property in Maryland, and distinguished between attempts to challenge property

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Maryland was employed. *Id.* Thus, such an abatement could not be said to be arbitrary as a matter of law in the sense that assessing authorities did not refuse to consider evidence or make an essential finding without supporting evidence. *See id.* at 149, 367 A.2d at 77.

There are other factors that support the Court of Special Appeals' finding that the assessing authorities were not arbitrary as a matter of law. First, § 67 does not specify that reassessment must be at its "full cash value." This observation, however, loses much of its persuasiveness when juxtaposed with § 14, which requires that property valuations be at full cash value (reflecting actual land use and current zoning).

A second factor unmentioned by the court, but which strongly supports its decision, is found in the statutory structure of a § 67 decision. Section 67 requires that the director of finance approve an abatement before it can become effective. Significantly, the director has no statutory duties concerning assessment of property. His inclusion in the tripartite agreement arguably reveals a legislative intent to protect county tax revenues after the date of finality and after the tax rate has been determined. Thus, a § 67 decision may legitimately be supported by factors other than the actual cash value of property. Proponents of this argument would stress that assessing authorities (not the courts) are the proper determiners of the weight given to a relevant factor in arriving at an assessment. *See* Fields v. Supervisor of Assess., 255 Md. 1, 4, 255 A.2d 417, 419 (1969).

13. *See* 281 Md. at 411, 380 A.2d at 42-43 (1977).

14. *Id.*

15. *Id.* at 391, 380 A.2d at 32. It is unclear why Judge Orth began his analysis with a discussion of the necessity of invoking special statutory remedies. In fact, later in the opinion, the court stated that "there was no failure to exhaust the administrative remedies provided by the statute." *Id.* at 404, 380 A.2d at 39. In the circumstances of this case, the Clarks availed themselves of all of the procedures open to them under article 81. Because the moratorium was enacted after the date of finality, the only statutory course of action available to them was pursuant to § 67.

assessments before and after they become final for a taxable year. He stated that, when invoked before this date of finality,[16] a statutory right to protest an assessment exists and that this statutory right encompasses judicial review of the administrative action taken on the protest,[17] but that after the assessment becomes final, section 67 provides the only avenue of relief ordinarily available from an onerous assessment.[18] Judge Orth's opinion for the court concluded that there was no statutory authority giving a circuit court jurisdiction over a section 67 real property assessment reduction.[19]

Only after laying this foundation did the court directly address the first issue before it on appeal: whether the trial court had an inherent, nonstatutory right to correct administrative abuses of discretion and arbitrary, illegal, capricious, or unreasonable acts, which gave it jurisdiction to make such determinations with respect to section 67 proceedings.[20] Judge Orth first examined *Criminal Injuries Compensation Board v. Gould,*[21] the case upon which the circuit court and the Court of Special Appeals primarily relied.[22] Gould, a crime victim, filed for an award under the Criminal Injuries Compensation Act. When no award was allowed, he sought judicial review of the administrative determination rejecting his claim. Despite explicit statutory language precluding Gould from obtaining judicial review of this administrative determination,[23] the Court of Appeals held that Gould was in fact entitled to judicial review, and invoked the inherent power of the court to review and correct actions of an administrative agency that were arbitrary, illegal, capricious, or unreasonable.[24] The *Clark* court noted that the Court of Special Appeals had interpreted *Gould* to mean that:

After the supervisor of assessments, the director of finance, and the appeal tax court granted a 25% abatement, the Clarks' statutorily created remedies were exhausted.

The *Clark* opinion as it originally appeared in the unofficial slip sheets contained an even greater emphasis on the necessity of following special statutory remedies. The slip opinion stated: "The foundation of our determination that the Circuit Court for Montgomery County did not have jurisdiction . . . is the requirement . . . that when a special statutory remedy exists it must be followed." State Dep't of Assess. & Taxation v. Clark, 77-23, slip op. at 6 (Md. Ct. App. Nov. 4, 1977).

16. The date of finality is the first day of January. MD. ANN. CODE art. 81, § 29A(a) (1975).

17. 281 Md. at 393, 380 A.2d at 33-34. *See* note 7 *supra.*

18. *See* 281 Md. at 394, 380 A.2d at 34. For the text of § 67, see note 8 *supra.*

19. 281 Md. at 396, 380 A.2d at 35. As pointed out by the court, § 67 determinations are not subject to the provisions of the State Administrative Procedure Act. MD. ANN. CODE art. 41, § 255 (1978). The State Department of Assessments and Taxation is not considered to be an agency under the Act. *Id.* § 244(a).

20. 281 Md. at 396-403, 380 A.2d at 35-38.

21. 273 Md. 486, 331 A.2d 55 (1975).

22. 281 Md. at 397, 380 A.2d at 35.

23. 273 Md. at 494, 331 A.2d at 61. Under the statutory scheme, only the Attorney General and the Secretary of Public Safety and Correctional Services can commence a proceeding to obtain judicial review. As to all other persons, the statute provides that "[t]here shall be no judicial review of any decision made or action taken by the Board . . . ." *Id.*

24. *Id.* at 500-01, 331 A.2d at 65. The *Gould* court stated: "this Court in a long line of cases, has consistently held that the Legislature cannot divest the courts of the

> "A legislature may not circumvent the system of checks and balances which guarantee that no branch of government, however designated, may be granted *an untrammelled* right arbitrarily to grant or withhold that which is derived from the people, be it due as a matter of right, sought as an aspiration, or bestowed as largess."[25]

The Court of Appeals then purported to distill this language to its essence, concluding that the right of a court to utilize its inherent powers to prevent illegal, unreasonable, arbitrary, or capricious administrative action is predicated upon the legislature's failure to provide expressly for judicial review and that the provision of a reasonable method of judicial review would make impossible unchecked assertions of arbitrary administrative authority.[26] Thus, if a statutory right to review exists, the inherent power to review for arbitrariness cannot be invoked.[27] The Court of Appeals next attempted to distinguish *Gould* from *Clark*, arguing that no statutory right of review existed in *Gould*, and that the inherent power of the court to review for arbitrariness could only be asserted in that case because of the absence of such a statutory right,[28] but that in *Clark* a statutory right of judicial review was fully available to the appellees prior to the date on which the 1972 assessment became final.[29] Although the court recognized that no statutory judicial review was available in a proceeding under section 67, it concluded that section 67 could not be isolated from the other provisions of article 81 pertaining to the assessment of real property. Because section 67 is part of a comprehensive scheme for property assessment, and because statutory judicial review is fully available under the statutory scheme to all taxpayers protesting prior to the date upon which assessments become final, the court concluded that in the absence of a statute providing for review, judicial review was unavailable to a person requesting a reassessment after the date of finality under section 67.[30]

The foundation upon which the *Clark* court rested its decision was the proposition that a right to review was available under the applicable statute. Judge Orth in fact stated that the availability of statutory review constituted the "manifest distinguishing feature" between *Clark* and *Gould*.[31] In holding that the right to judicial review was statutorily available to the Clarks, however, the Court of Appeals used the term "available" in an unwarranted and unprecedented manner. Even if section 67 is viewed in the

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inherent power they possess to review and correct actions by an administrative agency which are arbitrary, illegal, capricious or unreasonable." *Id.*

25. 281 Md. at 399, 380 A.2d at 36 (quoting State Dep't of Assess. & Taxation v. Clark, 34 Md. App. 136, 145, 367 A.2d 71, 76 (1976)) (emphasis supplied by the Court of Appeals).

26. 281 Md. at 399, 380 A.2d at 37-38.

27. *Id.* at 402, 380 A.2d at 38.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

context of a comprehensive statutory scheme, there is still an absence of statutorily provided judicial review for persons in the Clarks' position. Because of the timing of the moratorium, the Clarks could not avail themselves of the statutory pre-finality right to judicial review. It is meaningless to speak of the Clarks' right to judicial review under the comprehensive statutory scheme when they could not have availed themselves of such review. Under article 81, statutory review was available only to those petitioning for review prior to the date of finality. The court was correct in stating that the Clarks had a statutory right to judicial review prior to the date of finality. In focusing on this aspect of the case, however, it failed to recognize that the Clarks did not appeal their assessment, per se, before the circuit court. Rather, in alleging arbitrary and capricious action, they challenged the legitimacy of the process by which their property was reassessed, and contrary to the Court of Appeals' conclusion, such review is not available under the statutory scheme for section 67 proceedings.[32] The issue of the legitimacy of a section 67 proceeding can never be raised in the statutory review provided pre-finality determinations of an assessment's propriety, for section 67 cannot be invoked until after the date of finality. Thus, under the circumstances of the case before the court, no statutory right to judicial review was available to the Clarks, and it appears that *Clark* and *Gould* are indistinguishable on this ground.

The apparent consequences of the court's analysis are startling. The *Clark* opinion permits an entire class of administrative actions, that is, section 67 proceedings, to escape any judicial review no matter how arbitrary, illegal, capricious, or unreasonable the actions might be, so long as they comprise part of a comprehensive statutory scheme. *Clark* appears to permit the insulation of administrative determinations from review whenever statutory judicial review is provided for different determinations involving the same subject matter, so long as the determinations are part of the same comprehensive statutory scheme. It thus appears that, using the *Clark* rationale, the legislature could preclude judicial review of an

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32. Review for arbitrariness and capriciousness is not, of course, designed to allow de novo review of the result reached by the decisionmaker. It merely ensures that the determination was reached in a permissible fashion. In reviewing for arbitrariness, the judiciary must take care not to interfere with the "legislative prerogative, or with the exercise of sound administrative discretion . . . ." Hecht v. Crook, 184 Md. 271, 280-81, 40 A.2d 673, 677 (1945). There must not be a de novo substitution of a court decision for an administrator's discretion. Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 217, 334 A.2d 514, 519-21 (1975). Judicial review, in other words, "must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment." State Ins. Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 309-10, 236 A.2d 282, 292 (1967). The Maryland Constitution has been interpreted to forbid courts from exercising nonjudicial functions; therefore, courts must not sit as administrative boards of review. 274 Md. 211, 226, 334 A.2d 514, 524 (1975); Tawes v. Williams, 179 Md. 224, 228, 17 A.2d 137, 139 (1941); Mayor of Baltimore v. Bonaparte, 93 Md. 156, 158-59, 48 A. 735, 735-36 (1901).

administrator's arbitrary action throughout a statutory scheme by providing for statutory judicial review under one provision in the scheme. Blatantly arbitrary action might be taken pursuant to a nonreviewable section, and the court could merely point out that statutory sections cannot be interpreted in isolation from other portions of the statutory scheme. Under the rule enunciated in *Clark*, a court would ultimately be forced to hold that because review was "available" under the statutory scheme, no subsequent review of actions taken pursuant to the nonreviewable sections would be available.

Even more importantly, permitting any class of administrative actions to escape review for arbitrariness implies, if carried to its logical conclusion, that the legislature has the authority to preclude judicial review of any administrative determination. By holding that courts are without jurisidiction to review possibly arbitrary decisions made pursuant to section 67, the *Clark* court in effect treated the inherent power to review administrative actions for arbitrariness as a common law power rather than an inherent judicial power rooted in the Constitution.[33] If a court's authority to review for arbitrariness is based solely on the common law, then the far-ranging consequence of *Clark* is that the legislature has the authority to limit or preclude such review regardless of whether review is provided in another part of some statutory scheme.[34]

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33. Treating the inherent power to review for arbitrariness as a common law power subject to legislative abrogation would seem to be contrary to fundamental constitutional principles. Professor Henry Hart has stated that it is "a necessary postulate of constitutional government — that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953). *See* Schneider v. Pullen, 198 Md. 64, 68, 81 A.2d 226, 228 (1968).

There is some question as to the specific nature of this inherent judicial power to review for arbitrariness. In addition to the constitutional separation of powers argument, and its attendant emphasis on judicial checks on arbitrary action even in instances in which traditionally recognized rights are not at stake, *see* notes 35 to 41 and accompanying text *infra*, the inherent power to review may alternatively be grounded in due process. Professor Jaffe explains that "[t]he proposition that due process may require a certain amount of judicial process may be thought just another way of saying that the judiciary is the constitutional organ for determination of questions of legal power." Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 769, 798 (1958).

A litigant's ability to invoke the inherent power of a court to review for arbitrariness has been recognized as a constitutional right. Cohen, *Maryland Administrative Law*, 24 MD. L. REV. 1, 36 (1964); Tomlinson, *Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland*, 35 MD. L. REV. 414, 423 (1976). *See* Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 223, 334 A.2d 514, 523 (1975).

34. The common law is obviously subject to modification by the General Assembly. MD. CONST., Decl. of Rts., art. 5. *See, e.g.*, Health v. State, 198 Md. 455, 464, 85 A.2d 43, 47 (1951); Lutz v. State, 167 Md. 12, 15, 172 A. 354, 356 (1934); *In re* Davis, 17 Md. App. 98, 102, 299 A.2d 856, 859 (1973).

This result cannot be justified under established principles of Maryland and constitutional law. The inherent judicial power to review for arbitrariness is grounded in the constitutional precept of separation of powers[35] — the judiciary, a coordinate and independent branch of government, has its source of power in the Maryland Constitution,[36] and the power to review arbitrary actions, which vested upon the establishment of the courts, is necessary to fulfill the purpose for which this branch of government was created.[37] In viewing the overall structure of government it is clear that legislative interference with the inherent powers of the courts is an impermissible encroachment on the constitutional vesting of the judicial power.[38] Because the purpose of a tripartite government with checks and balances is to prevent the government from acting in an arbitrary or illegal fashion,[39] judicial review for arbitrariness appears to be essential to the administration of justice, and hence a part of the inherent judicial power upon which the legislature may not trespass. This notion of check was the rationale underlying the constitutional holding in *Gould*[40] and in the Court of Special Appeals' decision in *Clark*.[41] It appears that the *Clark* court's interpretation of the statutory scheme for property assessments resulted in an indefensible conception of available statutory remedies which provided an insufficient basis for distinguishing *Clark* from *Gould*. This operated to obscure the consequences of such an analysis, namely, encroachment on the inherent judicial power to review arbitrary administrative action.

In addition to the existence of a right to judicial review created elsewhere in the statutory scheme, two other factors appear to have

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35. *See* Jaffe, *supra* note 33, at 795–97.

36. Quenstedt v. Wilson, 173 Md. 11, 18, 194 A. 354, 357 (1937); Day v. Sheriff of Montgomery County, 162 Md. 221, 224–25, 159 A. 602, 604 (1932). *See* MD. CONST. art. IV, § 1 (1867, amended 1971).

37. 5 HARV. C.R.-C.L.L. REV. 1, 179–80 (1970). *See* MD. CONST. art. IV, § 1 (1867, amended 1971).

38. It is elementary that a constitutionally prohibited encroachment occurs when one of the three branches exercises powers that are within the sovereignty of another branch. Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 220–21, 334 A.2d 514, 521; Painter v. Mattfeldt, 119 Md. 466, 472, 87 A. 413, 416 (1913). *See* Cohen, *supra* note 33, at 36 (quoting Heaps v. Cobb, 185 Md. 372, 379, 45 A.2d 73, 76 (1945)).

39. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.09, at 68–69 (1958). In emphasizing the importance of the principle of judicial check, Professor Davis goes so far as to distinguish this principle from the precept of separation of powers. His fundamental concern is not that a given agency possesses a mixture of three kinds of power, but rather that unchecked administrative power must be minimized. Davis' approach is consistent with the arguments advanced here except insofar as he states that the principle of separation of powers is not at issue. From a structural point of view, it seems elementary that the separation of powers principle rests firmly on the foundation of the principle of check.

40. *See* Tomlinson, *supra* note 33, at 423 (analyzing the *Gould* decision, 273 Md. 486, 331 A.2d 55 (1975)).

41. 34 Md. App. 136, 145, 367 A.2d 69, 76 (1977).

influenced the court's decision: section 67 review was a matter of grace rather than of right,[42] and statutory judicial review of the assessment was available for the following tax year.[43] The court's reliance on the fact that relief under section 67 is a matter of grace and not right[44] seems to be grounded in the discredited constitutional doctrine of right versus privilege. This doctrine's underlying rationale was that the government may impose whatever conditions it wishes on citizens receiving its largess (that is, benefits or privileges the government need not give, as opposed to "rights," or those things owed people as of right).[45] Because the scope of such conditions was viewed as being unrestricted, due process, and hence review for arbitrariness, did not have to be afforded the recipient of a privilege from the government. Early Court of Appeals decisions followed this rationale;[46] however, later Supreme Court cases rejected the doctrine and now recognize that due process protections must be afforded in many instances when traditional property or personal rights are not at stake.[47] This modern view was reflected in *Gould*. Discussing previous Maryland law, the *Gould* court observed that "the impairment of 'personal or property rights' [was] a condition precedent to judicial review of alleged arbitrary, illegal or capricious actions of an administrative board,"[48] but went on to point out that "[the Court of Appeals'] later decisions unqualifiedly seem to permit such judicial review without conditioning it upon the existence of such rights,"[49] and that:

> There are benefits, privileges, mere licenses and entitlements which, in our modern society, are awarded by governmental action, not as a

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42. 281 Md. 385, 402, 380 A.2d 28, 38 (1977). Judge Orth relied on two earlier Court of Appeals decisions that found the potential relief offered by § 67 to be entirely discretionary — in other words, a matter of grace and not of right. *See* Montgomery County Council v. Supervisor of Assess., 275 Md. 339, 348, 340 A.2d 302, 307 (1975); Labelle v. State Tax Comm'n, 217 Md. 443, 451, 142 A.2d 560, 564, *cert. denied,* 358 U.S. 889 (1958).

43. 281 Md. at 402-03, 380 A.2d at 38.

44. *Id.* at 402, 380 A.2d at 38.

45. K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.12, at 175-80 (1972).

46. *See* Johnstown Coal & Coke Co. v. Dishong, 198 Md. 467, 473-74, 84 A.2d 847, 850 (1951); Heaps v. Cobb, 185 Md. 372, 379, 45 A.2d 73, 76 (1945).

47. *E.g.,* Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970). *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

48. Criminal Injuries Comp. Bd. v. Gould, 273 Md. 486, 507-08, 331 A.2d 55, 68 (1975).

49. *Id.* at 508, 331 A.2d at 68-69. *See* County Council v. Investors Funding Corp., 270 Md. 403, 434-37, 312 A.2d 225, 242-43 (1973); State Ins. Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 300, 236 A.2d 282, 286 (1967). *Contra,* 273 Md. at 522, 331 A.2d at 76 (Eldridge, J., dissenting) ("where no pre-existing personal or property right is present the legislature may couple the award of a gratuity with a condition precluding judicial review.").

> matter of right but through the exercise of sound discretion. . . . [T]hese "grants" have been held to be within the ambit of judicial review of the action of the agencies created to administer them.[50]

The court in *Gould* did not explicitly address the due process aspect of judicial review of arbitrary agency action; rather, the inherent power to review was perceived as resting upon the theoretical basis of the residual judicial power to check improper administrative action.[51] A due process analysis, however, is equally apt under the circumstances. Perhaps the state is under no obligation to provide post-finality administrative review of property assessments, but once this review has been granted it must comply with the requirements of due process. This means that the administrative determination must not be arbitrary; and the only way to ensure this result is by permitting judicial examination of the administrative determination.[52]

The *Clark* court's second argument pertained to the fact that statutory judicial review as of right was available for the following tax year.[53] The availability of judicial review of the following year's assessment, however, is irrelevant to the assessment for the year in question. The Clarks, it will be recalled, argued for a reassessment that would have covered the next six-month period of 1972; their specific grievance did not arise out of the assessment for the 1973 tax year. Regardless of the existence of a scheme providing for review on an annual recurring basis, it is clear that an abatement for 1973 would not serve to refund the taxes paid in 1972.[54] In short, the court perceived a limitation on the inherent power to review arbitrary action in year one because of an opportunity to obtain statutory review in year two for a year two assessment. In holding that an opportunity for review in 1973 patently precluded review in 1972, it appears

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50. 273 Md. at 508, 331 A.2d at 69.

51. *Id.* Discussion of judicial checks on administrative determinations can be found in decisions prior to *Gould*. *See* County Council v. Investors Funding Corp., 270 Md. 403, 434-37, 312 A.2d 225, 242-43 (1973); State Ins. Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 300, 236 A.2d 282, 286 (1967). These discussions, however, referred to the traditional condition that in order for a court to review arbitrary action, a personal or property right had to be at stake. The *Gould* decision was the first instance in which the court expressly posited that infringement upon personal and property rights was not a condition precedent to invoking the inherent power of judicial review. The emphasis in *Clark* on the discretionary nature of § 67 proceedings seems to reaffirm the earlier position of the court.

52. *See* notes 98 & 99 and accompanying text *infra*.

53. 281 Md. at 402, 380 A.2d at 38.

54. Although not addressed by the court, fundamental issues were raised concerning the possibilities of a tax refund in the event of an abatement. Appellees argued that article 81, § 214 provided for a return of taxes paid. Brief for Appellee at 13-15. The Court of Special Appeals noted that it would be incongruous for the legislature to provide relief pursuant to § 67 if there were no authority to refund. 34 Md. App. at 156, 367 A.2d at 81. Appellants, on the other hand, relied on Raply v. Montgomery County, 261 Md. 98, 110-11, 274 A.2d 124, 130-31 (1971), in arguing that there is no common law right to a refund of taxes paid.

that the court either misconstrued or ignored the real issue before it — an injury to aggrieved citizens in 1972. A tax had to be paid for the 1972 tax year and, under the court's ruling, if the amount of that tax was determined in an improper fashion, the plaintiffs had no remedy to challenge that determination.

At least five reasons for the court's reluctance to review for arbitrariness may be hypothesized. First, determining whether the agency action is arbitrary is difficult where, as in the case of section 67 proceedings, no standards delineate the limits on the "discretionary" nature of the action.[55] When a statute provides no guidance, a time consuming investigation of the agency's functions may be necessary to determine the relevant decisionmaking criteria. Second, the court may have (legitimately) believed that agencies only rarely act arbitrarily and that allowing judicial review of administrative determinations poses a substantial risk of wasting judicial resources by forcing courts to entertain frivolous suits.[56] Third, the court may have feared that it was encroaching on the legislature's domain in permitting review of a statutorily prescribed procedure when the legislature had not provided for such review.[57] The problem with relying on these concerns as the basis of the *Clark* holding, however, is that these same problems exist whenever the court utilizes its inherent, nonstatutory power to review an administrative determination. Furthermore, these concerns have not prevented courts from exercising this power in the past. In *Gould,* for example, an understanding of the agency's decisionmaking criteria was necessary; the potential of a frivolous suit existed; and the legislature had explicitly attempted to bar judicial review. Nevertheless, the Court of Appeals held that Gould was entitled to review of the administrative determination for arbitrariness.[58]

The *Clark* court also may have been concerned that the statutory scheme for assessing property values would be thrown into disorder if review of section 67 proceedings was allowed.[59] Taxpayers might short-circuit the series of administrative hearings provided under pre-finality procedures by waiting until after the date of finality, applying for relief under section 67 and, if dissatisfied with the administrator's action, filing

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55. *See* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 380–82 (1968).

56. *Id.* at 381.

57. The courts, of course, are powerless to encroach upon or interfere with the legislature's constitutional exercise of power. *See* McBriety v. Mayor of Baltimore, 219 Md. 223, 234, 148 A.2d 408, 415 (1959). The Maryland Declaration of Rights provides "[t]hat the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Department shall assume or discharge the duties of any other." MD. CONST., Decl. of Rts., art. 8. *See* Painter v. Mattfeldt, 119 Md. 466, 472, 87 A. 413, 415 (1913) (dictum) (no branch is subordinate to another); Magruder v. Swann, 25 Md. 173 (1866) (dictum) (each branch within its own sphere is independent of the others) (construing former constitution). *See* Jaffe, *supra* note 33, at 796 (1958).

58. 273 Md. at 513, 331 A.2d at 71.

59. *See* Brief for Appellant Director of Finance for Montgomery County at 32–35.

suit in the circuit court charging the administrator with arbitrary behavior.[60] The court's discussion of exhaustion,[61] a doctrine which, although inapplicable in this instance, is designed to prevent such "short-circuiting" of administrative procedures, indicates a serious concern for this problem. There are two difficulties with this scenario. First, no taxpayer would willingly choose a section 67 proceeding over a pre-finality determination of his assessment, for a taxpayer proceeding under section 67 must meet a more stringent standard of proof. Pre-finality petitioners need only produce affirmative evidence to show an incorrect assessment,[62] while petitioners who are dissatisfied with section 67 relief must take on the onerous burden of establishing arbitrary agency action. Second, this burden is one that the petitioner who is truly attempting to "short-circuit" the pre-finality appeal process could never meet. If the reason for requesting the reassessment existed prior to the date of finality, the availability of the statutory appellate process to the property owner would provide a rational basis for refusing an abatement of assessment.

Finally, the *Clark* court's reluctance to review section 67 determinations may have been due to judicial speculation that the legislature, because of cost considerations, would not have implemented a post-finality remedy if it had foreseen disruption of revenue from the property tax assessment scheme through large abatements as a result of judicial review. In choosing between a situation in which some petitioners receive arbitrarily decided abatements, and a situation in which no one receives any reduction (as would be the case if the legislature had not enacted section 67), the first alternative clearly seems the lesser of two evils. There are, however, other ways to achieve an abatement scheme that is both cost controlled and nonarbitrary. One alternative would be to enact standards to guide administrators in arriving at abatements.[63] This perhaps could be achieved by devising a formula, with appropriate abatement ceilings for a given year, that would restrict the maximum allowable abatements to a figure consistent with a balanced budget. Arbitrary abatements are not only repugnant from a policy point of

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60. The argument here is that a taxpayer who failed to protest an assessment, for whatever reason, could obtain relief under § 67 and then immediately request circuit court review. This would obviously be a more direct route to judicial review than the method of obtaining review under pre-finality procedures.

A favorite shortcut currently used by Baltimore City taxpayers to bypass the first stages of administrative appeal is to file appeals with the supervisor of assessments and appeal board, and then fail to appear for their hearings. The assessor and board simply reaffirm their earlier assessments, and the homeowner is thereby enabled to appeal to the next level, the Maryland Tax Court, the first stage of the process at which a record is made. The Evening Sun (Baltimore), Jan. 19, 1978, § C, at 1, col. 4. In Howard County, however, appeals of taxpayers who do not appear for hearings are dismissed, and there is no further right of appeal. The Evening Sun (Baltimore), Jan. 20, 1978, § D, at 18, col. 1.

61. 281 Md. at 401-05, 380 A.2d at 37-39.

62. MD. ANN. CODE art. 81, § 229(h) (1975).

63. *See generally* K. DAVIS, *supra* note 39, § 2.00-04 (Supp. 1976).

view; they also are legally unjustifiable,[64] and, therefore, judicial reluctance founded on the aforementioned considerations is ill-considered.

Notwithstanding covert or overt expressions of judicial reluctance to review in situations similar to *Clark*, it is unlikely, in view of the court's numerous pronouncements on the inability of the legislature to limit inherent judicial review power, that the *Clark* decision will spawn an array of explicitly review-proof legislation. The real danger of the court's decision lies in the manner in which the court justified a denial of review by employing the "comprehensive scheme" analysis to distinguish *Clark* from *Gould*.[65] This analysis, however, is amorphous and should not be viewed as necessarily precluding judicial review. For example, a court might avoid the more extreme results of the *Clark* analysis by concluding that a given statutory scheme is divisible. Within one article of a statute, the court with little difficulty could find two schemes affecting two different classes of persons. In the *Clark* case, for instance, two schemes within article 81 could be recognized: the statutory provisions applicable to a pre-finality challenge, and the provisions relevant to a post-finality appeal. The court could then, under well-settled precedent, invoke its inherent power to review a section 67 proceeding. The ease with which two different results can be reached by applying the same basic analysis is not, however, an indication that the opinion is satisfactory. Rather, the potential for abuse of such an escape device is yet another indication of the dangers involved in employing the "comprehensive scheme" approach.

INHERENT POWER OF JUDICIAL REVIEW TO DETERMINE THE CONSTITUTIONALITY OF THE ADMINISTRATIVE DETERMINATION

Having disposed of review for arbitrariness, the court next addressed the appellees' arguments pertaining to the constitutional issues of equal protection and eminent domain. The Clarks asserted that they had been found to be entitled to relief under section 67 and, therefore, their right to equal protection entitled them to be treated in the same manner as other persons who were similarly affected by the moratorium.[66] According to the Clarks, there was only one legitimate class of persons at issue, namely all persons whose property assessments were affected by the sewer moratorium. Because taxpayers unable to file timely protests were automatically restricted to a twenty-five percent abatement, while those who timely filed were not similarly restricted, the date of finality was characterized by the Clarks as an illegitimate basis for classification.

The Court of Appeals' examination of the facts revealed that the Supervisor of Assessments for Montgomery County had adopted a policy

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64. *See* notes 97 to 99 and accompanying text *infra*.
65. *See* 281 Md. at 402, 380 A.2d at 38.
66. *Id.* at 406, 380 A.2d at 40.

whereby section 67 protestors were in fact limited to a twenty-five percent reduction in assessment.[67] It was, however, unclear whether pre-finality protestors were similarly limited to a twenty-five percent abatement. According to a memorandum of November 16, 1973 from the Montgomery County Supervisor of Assessments to the appeal tax court, the twenty-five percent policy was adhered to in both section 67 cases and in instances of pre-finality interests.[68] This statement of policy was contradicted by a member of the appeal tax court who stated that it was the practice of the court to reduce assessments affected by the moratorium " 'to the full extent that we thought they were warranted' " if such assessments were timely protested.[69] On the other hand, when relief was sought pursuant to section 67, only twenty-five percent abatements were granted as a matter of policy even if a particular property warranted a greater reduction.[70]

The Court of Appeals addressed this equal protection claim by pointing out that the purpose of the constitutional guarantee of equal protection was to shield individuals against intentional and arbitrary discrimination whether it be by explicit statutory classification or by improper enforcement of statutory policy.[71] According to the standard applied by the court, only " '[i]ntentional and systematic undervaluation by assessors of other taxable property in the same class violates the constitutional right of a person taxed upon the full value of his property. . . . There must be something which in effect amounts to an intentional violation of the essential principle of practical uniformity.' "[72] The court further observed that " 'the assessment of the property of others at a lower proportion of its value than that of a complaining taxpayer, which is not assessed at more than its fair cash value, does not make the tax on the latter invalid, unless the assessment was fraudulently made.' "[73] Upon application of this standard to the facts before it, the *Clark* court held that there was no violation of equal protection of the laws even though pre-finality date protestors may have received larger abatements than property owners protesting through section 67.[74]

Although the Court of Appeals may have reached a correct conclusion on this issue, it did so by employing a seemingly inapplicable standard. First, the Clarks did not allege that other property was being systematically undervalued; rather, they asserted that in obtaining abatements, pre-finality protestors were not restricted to the full extent warranted under the circumstances, and that they, in contrast, were limited to a twenty-five percent reduction. Second, the application of the twenty-five percent policy

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67. *Id.* at 407-08, 380 A.2d at 41.
68. *Id.* at 408, 380 A.2d at 41.
69. *Id.*
70. *Id.*
71. *Id.* at 408-09, 380 A.2d at 41-42.
72. *Id.* at 409, 380 A.2d at 41-42 (quoting Rogan v. Commissioners, 194 Md. 299, 310, 71 A.2d 47, 51 (1950)).
73. *Id.*
74. 281 Md. at 409-10, 380 A.2d at 42.

to post-finality protests was not attacked by the Clarks as persons in the position of being taxed upon the full value of their property. Rather, their position was that the twenty-five percent policy resulted in an assessment that was greater than the fair cost value of their land. In essence, the Clarks alleged that their assessment for 1972 was greater than the fair value of their property, and that they were legally entitled to the same unrestricted relief that was available to pre-finality protestors.

For the foregoing reasons, it appears that the court should have simply applied the traditional "rational relationship" test in order to determine the validity of the equal protection claim. Under this test there is a minimum requirement that a state classification have some rational relationship to a legitimate state purpose.[75] The administrative policy at issue employed the date of finality to divide taxpayers into pre-finality and post-finality classes. It is a relatively simple matter to justify the need for imposing such a classification: "[a] final determination of property tax assessments is vital in the ascertainment of a tax base, the fixing of tax rate, the accurate calculating of future revenues and a timely levying of taxes, so that a balanced budget may be obtained."[76] Thus, the restriction on post-finality abatements appears to be rationally related to the legitimate state purpose of protecting county revenues and budgetary commitments for a given tax year. It is obvious that the Clarks' equal protection claim fails not only under the test adopted by the court in this case, but also under this more appropriate rational relationship standard.

The Clarks' second constitutional argument, seemingly raised as an afterthought, focused on the allegedly unconstitutional taking aspect of the appellant's refusal to grant adequate relief. Without citation of authority, the Clarks contended that the insufficient abatement amounted to a deprivation of their property rights in violation of the fourteenth amendment to the Constitution.[77] They did not challenge the legality of the sewer moratorium, but instead argued that they were deprived of their right to use their property as zoned because inadequate relief was provided when the ban was declared. In conformity with settled principles, the court pointed out that a case for an unconstitutional deprivation is not made out unless the restriction deprives the taxpayer of "any reasonable use" of his property.[78] Because the Clarks still had use of the property as a residence, the court justifiably held that there was no deprivation.

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75. *See, e.g.*, Aero Motors, Inc. v. Administrator, Motor Vehicle Admin., 274 Md. 567, 575-78, 337 A.2d 685, 692-94 (1975); National Can Corp. v. State Tax Comm'n., 220 Md. 418, 429-35, 153 A.2d 287, 293-97 (1959); Allied Am. Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles, 219 Md. 607, 617-18, 150 A.2d 421, 427-28 (1959).

76. 281 Md. at 392, 380 A.2d at 33 (1977).

77. Brief for Appellee at 12-13.

78. 281 Md. at 410, 380 A.2d at 42.

THE UNADDRESSED CONSTITUTIONAL ISSUE: SUBSTANTIVE DUE PROCESS

A final fundamental constitutional issue that was not addressed by the court must also be considered. This issue arises out of the Clarks' claim that section 67 as applied to them resulted in a denial of due process. In *Clark,* the court refused to consider whether the action taken with respect to the relief provided in section 67 was arbitrary, illegal, capricious, or unreasonable,[79] restricting its review to an examination of whether the assessing authorities had complied with constitutional standards in reaching their determination.[80] After finding that the Clarks had not been denied equal protection and had not been deprived of their property without just compensation, the Court of Appeals concluded that the abatement decision was not constitutionally infirm.[81] The court's distinction between review for arbitrary, illegal, capricious, or unreasonable action, and review for compliance with constitutional standards is, however, questionable. Implicit in the court's distinction is the assumption that arbitrary, illegal, capricious, or unreasonable agency action does not violate due process rights, but, in drawing a distinction between these two types of review, the court apparently overlooked the fact that arbitrary administrative action may violate constitutional due process rights.[82] The problem with the court's formulation of these two types of review is the failure to recognize that administrative arbitrariness may deprive an individual of constitutional rights in addition to denying statutory or nonconstitutional rights to be free from administrative arbitrariness. In order to disperse the confusion that may arise from the court's distinction between the two different types of review, the possible meanings of administrative arbitrariness must be elaborated.

The question of how arbitrary administrative action affects due process rights has received scant judicial attention in Maryland. This may be partially explained by the fact that allegations of arbitrary and capricious action can normally be reviewed under Maryland's Administrative Procedure Act (APA),[83] or under a specially provided appeals statute outside the ambit of Maryland's APA, or pursuant to the inherent power of a court to review for "common law" arbitrariness;[84] and therefore if one of these

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79. *See id.* at 396-403, 380 A.2d at 35-38.

80. *Id.* at 403-11, 380 A.2d at 38-43.

81. *Id.* at 411, 380 A.2d at 43.

82. *See* notes 97 to 99 and accompanying text *infra.*

83. Maryland's Administrative Procedure Act is found in MD. ANN. CODE art. 41, §§ 244-256A (1978). Section 255(g)(8) of the Act deals with judicial review of arbitrary or capricious agency action.

84. *See, e.g.,* Criminal Injuries Comp. Bd. v. Gould, 273 Md. 486, 500-01, 331 A.2d 55, 65 (1975); State Ins. Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 300-01, 236 A.2d 282, 286 (1966) (dictum); State Dep't of Health v. Walker, 238 Md. 512, 522-23, 209 A.2d 555, 561 (1965); Town of Dist. Heights v. County Comm'rs, 210 Md. 142, 146, 122 A.2d 489, 492 (1956) (dictum); Hammond v. Love, 187 Md. 138, 143-44, 49 A.2d 75, 77 (1946); Mahoney v. Byers, 187 Md. 81, 85-86, 48 A.2d 600, 603 (1946); Hecht v. Crook, 184 Md. 271, 280-81, 40 A.2d 673, 677 (1945).

options is exercised there is no need to address constitutional issues. An examination of past cases in which the court has defined arbitrary action indicates that the issue of arbitrariness typically has arisen in two different contexts: mistaken interpretations of law,[85] and cases in which factual findings are insufficient to support agency decisions.[86] The Court of Appeals has commonly referred to two different standards of review to determine if a factual finding is arbitrary. One of these standards, the substantial evidence test, appears to be grounded in nonconstitutional considerations.[87] A second type of judicial review for arbitrariness entails inquiry into whether a finding is without supporting evidence.[88] Under certain circumstances, this

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85. *See, e.g.*, Criminal Injuries Comp. Bd. v. Gould, 273 Md. 486, 521, 331 A.2d 55, 76 (1975); State Dep't of Health v. Walker, 238 Md. 512, 523, 209 A.2d 555, 561 (1965); Hammond v. Love, 187 Md. 138, 143-44, 49 A.2d 75, 77 (1946); Hecht v. Crook, 184 Md. 271, 280-81, 40 A.2d 673, 677 (1945). In *Hammond*, the court pointed out that "illegal action is reviewable, as such, without characterizing it as 'arbitrary' " action. 187 Md. at 145, 49 A.2d at 78.

86. *See* notes 90 & 91 *infra*.

87. *See* Dickinson-Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 255-56, 329 A.2d 18, 24-25 (1974); State Dep't of Health v. Walker, 238 Md. 512, 523, 209 A.2d 555, 561 (1965); Snowden v. Mayor of Baltimore, 224 Md. 443, 445, 168 A.2d 390, 391 (1961); Board of Zoning Appeals v. Meyer, 207 Md. 389, 401, 114 A.2d 626, 631 (1955).

88. *See* note 95 and accompanying text *infra*.

In the recent case of Mayor of Annapolis v. Annapolis Waterfront Co., 79-6, slip op., (Md. Ct. App. Jan. 24, 1979), the Court of Appeals elaborated upon past case law and articulated a new standard for judicial evaluation of administrative decision-making. A two-pronged standard was adopted for evaluating whether an agency decision was arbitrary, illegal, capricious, or unreasonable. According to the court, a threshold inquiry must determine whether the agency decision was "fairly debatable," that is, whether its " 'determination *involved testimony from which a reasonable man could come to different conclusions.*' " *Id.* at 18 (emphasis supplied by the court) (quoting Eger v. Stone, 253 Md. 533, 542, 253 A.2d 372, 377 (1969)). Because the issues before the agency in *Annapolis Waterfront* were "debated" and "subject to controversy," the court deemed them to have been "fairly debatable." Slip op. at 20. The second prong of the new test requires that the reviewing court determine, when the scope of review is not specified by statute, whether the administrative findings were supported by substantial evidence. The court retained the traditional standard of substantial evidence review: " 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.' " *Id.* at 21 (quoting State Ins. Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 309, 236 A.2d 282, 292 (1967)). Thus, according to the court's test, an agency's decision must be affirmed if it is fairly debatable and supported by substantial evidence.

It is important to recognize that although past cases have occasionally used the fairly debatable and substantial evidence tests concurrently, *Annapolis Waterfront* is the first case in which the Court of Appeals has expressly elaborated and synthesized these tests into a single standard. In past cases the substantial evidence test and the fairly debatable standard have functioned to ensure that an appropriate degree of judicial restraint is exercised when agency decisions are reviewed. Such restraint fosters the beneficial exercise of administrative expertise. The fact that the court used similar language to define these standards, which are obviously designed to further the same essential purpose, raises doubt as to whether any material differences exist between the two prongs. There is, however, no doubt that the court now considers these two standards to be different. The trial court was, in fact, reversed partially because it had failed to consider whether the issues were fairly

second standard may serve as a restricted form of review for constitutional violations.[89] In the many instances in which the Court of Appeals has indicated the meaning of arbitrary action,[90] and in cases wherein the court has referred to its inherent power to review for arbitrary, illegal, capricious,

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debatable — despite its finding that the agency decision was unsupported by substantial evidence. *Id.* at 19.

The wisdom of the court's formulation of a new review standard may be challenged on the ground that it is unclear that the two prongs of the standard are different. An examination of their language reveals that each test requires the court to engage in an apparently identical inquiry. Under either test an agency decision is reviewed according to a reasonable man standard — both tests specify that a reasonable man be able to reach the conclusion arrived at by the agency. The substantial evidence test, however, includes the additional language that a reasonable man "reasonably could have reached" the conclusion. Because the obvious inference from the fairly debatable test is that a reasonable man reaches reasonable conclusions, it appears that this additional language should be ignored as surplusage. If this inference is justified, then the two tests are in fact identical and the formulation of a standard of judicial review in terms of two ostensibly different analyses is incorrect and unnecessarily confusing. In past cases, the fairly debatable test has been viewed by the court as generating the inquiry required by the substantial evidence test. In fact, in its discussion of the two prongs, the *Annapolis Waterfront* court quoted with approval State Ins. Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 309, 236 A.2d 282, 292 (1967), in which the court stated that the differences between the fairly debatable and substantial evidence tests were slight and that under either standard judicial review essentially reduces to a determination of "'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" Slip op. at 20 n.8.

It is now apparent, however, that the Court of Appeals has infused new meaning into the fairly debatable test so as to give greater latitude to agency decisions. Instead of limiting the meaning of the fairly debatable test to whether a reasonable man could have reached different conclusions, this test may now be interpreted with an emphasis on the term "debatable." This interpretation appears plausible in view of the *Annapolis Waterfront* court's attempt to explain the fairly debatable test through reliance on authority that emphasized the literal meaning of "debatable" — a determination subject to dispute or contention. *Id.* at 18. If "debatable" is interpreted in this commonly understood sense, almost any conceivable agency action would at least satisfy the first prong.

The adoption of the two-pronged test may be further criticized on the ground that even if the first prong is broader than the second, it nevertheless serves no legitimate purpose. It is clear that in some cases an agency determination deemed fairly debatable may or may not be supported by substantial evidence. It is similarly obvious that a determination that was not fairly debatable could not satisfy the substantial evidence test. Thus, no function is served by the first prong that is not already served by the second prong, and the first step of the process appears to be superfluous because the class of decisions that are fairly debatable are subsumed within the class of determinations supported by substantial evidence. It is also clear that a determination supported by substantial evidence could not fail under the fairly debatable test. Despite the fact that the first prong of the two-pronged test is superfluous, however, litigants should nevertheless draft their pleadings to include the litany specified by the two-step standard articulated in *Annapolis Waterfront.*

89. *See* note 97 and accompanying text *infra.*

90. *See* Dickinson-Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 255-56, 329 A.2d 18, 24-25 (1974) (a finding unsupported by substantial evidence); State Ins.

or unreasonable action,[91] no mention has been made of how arbitrary action affects due process rights. Such cases in fact seem to suggest the existence of a nonconstitutional right to be free from arbitrary agency action. Upon allegations of this nonconstitutional form of arbitrariness, a substantial evidence standard of review frequently has been applied by the Court of Appeals.[92] When a statutory right to judicial review exists, but the statute fails to specify the standard of review, the court has applied the substantial evidence test.[93] In instances when the legislature has not provided a statutory right of judicial review, the court has applied the substantial evidence test[94] and the "no supporting evidence" standard.[95] If no statutory appeal is available, and if the Maryland APA is inapplicable, a reviewing court will grant appropriate relief through a writ of mandamus, an injunction, or other means, upon a showing that the administrative decision is arbitrary or capricious.[96] In addition to the nonconstitutional form of

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Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 300–01, 236 A.2d 282, 286 (1967) (action unsupported by sufficient facts or proper factual inferences); State Dep't of Health v. Walker, 238 Md. 512, 523, 209 A.2d 555, 561 (1965) (decision contrary to law or unsupported by substantial evidence) (citing Hammond v. Love, 187 Md. 138, 49 A.2d 75 (1946)); Snowden v. Mayor of Baltimore, 224 Md. 443, 445, 168 A.2d 390, 391 (1961) (decision not based on substantial evidence); Board of Zoning Appeals v. Meyer, 207 Md. 389, 401, 114 A.2d 626, 631 (1955) (a finding devoid of substantial evidence); Williams v. McCardell, 198 Md. 320, 330, 84 A.2d 52, 56–57 (1951) (finding unsupported by evidence or conclusions contrary to law or facts); Heath v. Mayor of Baltimore, 187 Md. 296, 305, 49 A.2d 799, 804 (1946) (essential finding made without supporting evidence upon which to base a rational judgment).

91. *See, e.g.*, Zion Evangelical Luth. Church v. State Highway Admin., 276 Md. 630, 634–35, 350 A.2d 125, 128 (1976); Criminal Injuries Comp. Bd. v. Gould, 273 Md. 486, 500–01, 331 A.2d 55, 65 (1975); Baltimore Import Car Serv. v. Maryland Port Auth., 258 Md. 335, 342, 265 A.2d 868, 869–70 (1970) (dictum); State Ins. Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 300, 236 A.2d 282, 286 (1967) (dictum); Town of Dist. Heights v. County Comm'rs, 210 Md. 142, 146, 122 A.2d 489, 492 (1956) (dictum); Hecht v. Crook, 184 Md. 271, 280–81, 40 A.2d 673, 677 (1945).

92. *See* note 90 *supra*.

93. *See* Dickinson-Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 255–56, 329 A.2d 18, 25 (1974). The substantial evidence test is applied by the court to determine " 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. This need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.' " *Id.* at 256, 329 A.2d at 25 (quoting State Ins. Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 309–10, 236 A.2d 282, 292 (1967)). *See* Tomlinson, *supra* note 33, at 422–23 (1976).

94. *See* State Dep't of Health v. Walker, 238 Md. 512, 523, 209 A.2d 555, 561 (1965); Snowden v. Mayor of Baltimore, 224 Md. 443, 445–46, 168 A.2d 390, 391 (1961); Board of Zoning Appeals v. Meyer, 207 Md. 389, 400–01, 114 A.2d 626, 631 (1955).

95. Johnstown Coal & Coke Co. v. Dishong, 198 Md. 467, 473–74, 84 A.2d 847, 850 (1952); Williams v. McCardell, 198 Md. 320, 329–30, 84 A.2d 52, 56 (1951); Heath v. Mayor of Baltimore, 187 Md. 296, 305, 49 A.2d 799, 804 (1946); Heaps v. Cobb, 185 Md. 372, 380, 45 A.2d 73, 76 (1945).

96. *See* Criminal Injuries Comp. Bd. v. Gould, 273 Md. 486, 503, 331 A.2d 55, 66 (1975); State Dep't of Health v. Walker, 238 Md. 512, 522–23, 209 A.2d 555, 561 (1965); Heaps v. Cobb, 185 Md. 372, 379, 45 A.2d 73, 76 (1945).

arbitrariness, there also appears to be a type of arbitrariness that gives rise to constitutional due process issues. The Court of Appeals has stated in dictum in several cases that administrative arbitrariness in the form of decisions unsupported by any evidence may violate article 23 of the Maryland Declaration of Rights.[97] These decisions offer little elucidation of the term "any evidence." It is uncertain whether "any" should be read in the literal sense such that even a scintilla of evidence would satisfy constitutional requirements. Even if the production of "any evidence" would satisfy state constitutional requirements, federal due process standards must also be met. According to a number of relatively recent federal decisions, arbitrary administrative acts are subject to substantive due process constraints.[98]

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97. Article 23 provides "[t]hat no man ought to be taken or imprisoned or desseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. CONST., Decl. of Rts., art. 23. *See* Luxmanor Citizens Ass'n v. Burkart, 266 Md. 631, 647, 296 A.2d 403, 411 (1972) (dictum); Dundalk Holding Co. v. Horn, 266 Md. 280, 283, 292 A.2d 77, 78–79 (1972) (dictum); State Ins. Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 310–11, 236 A.2d 282, 293–94 (1967) (Barnes, J., dissenting). *Cf.* Johnstown Coal & Coke Co. v. Dishong, 198 Md. 467, 474, 84 A.2d 847, 850 (1952) (dictum) (citing Heaps v. Cobb, 185 Md. 372, 380, 45 A.2d 73, 76–77 (1945)) ("[A] finding unsupported by any evidence is beyond the power of an administrative agency as a denial of due process of law."); Howard Sports Daily v. Public Serv. Comm'n, 179 Md. 355, 359, 18 A.2d 210, 214 (1941) (due process is violated when an administrative body arbitrarily discriminates or acts contrary to statutory authority).

98. The cases in the substantive due process area for the most part fall within either the category of administrative decisions made by school boards, *see* Staton v. Mayes, 552 F.2d 908, 915–16 (10th Cir.), *cert. denied,* 434 U.S. 907 (1977) (for due process purposes a decision-maker should state the reason and evidentiary basis upon which the determination is based); Fisher v. Snyder, 476 F.2d 375, 377 (8th Cir. 1973) (nontenured teacher's dismissal is arbitrary and capricious if the reasons underlying dismissal are trivial, or unrelated to educational process or to working relationships, or is wholly unsupported by a basis in fact) (quoting McEnteggart v. Cataldo, 451 F.2d 1109, 1111 (1st Cir. 1971), *cert. denied,* 408 U.S. 943 (1972)); Miller v. Dean, 430 F. Supp. 26, 28–29 (D. Neb. 1976), *aff'd,* 552 F.2d 266 (8th Cir. 1977) (dictum) (state action depriving life, liberty, or property rights must have a rational basis); Canty v. Board of Educ., 312 F. Supp. 254, 256 (S.D.N.Y. 1970) (dictum), or decisions made by state correctional authorities, *see* Zannino v. Arnold, 531 F.2d 687, 690–91 (3d Cir. 1976) (dictum) (parole board must follow appropriate statutory criteria and its decision must not be arbitrary and capricious or based on impermissible considerations); Wilwording v. Swenson, 502 F.2d 844, 851 (8th Cir. 1974), *cert. denied,* 420 U.S. 412 (1975) (punishment allegedly imposed without any evidence being offered against prisoner); Beatham v. Manson, 369 F. Supp. 783, 791–92 (D. Conn. 1973) (substantive due process guarantees apply against arbitrary or capricious official action even when procedural due process does not; an assertion of arbitrary power violates due process).

Substantive due process issues have arisen in other contexts. *See* Garvey v. Freeman, 397 F.2d 600, 610 (10th Cir. 1968) (dictum) (a United States Department of Agriculture order without factual support is without due process); Bell Lines, Inc. v. United States, 263 F. Supp. 40, 46 (S.D. W. Va. 1967) (the requirements of the Federal Administrative Procedure Act govern Interstate Commerce Commission order and are essential to due process); Sterling Davis Dairy v. Freeman, 253 F. Supp. 80, 82–83 (D.N.J. 1968) (dictum) (Secretary of Agriculture's milk marketing order not supported

Some courts have in fact stated that due process requires that administrative decisions have a rational basis of support.[99]

The Maryland Court of Appeals' treatment of this due process issue has been limited, but the constitutional ramifications of arbitrary administrative action have been more widely explored in other jurisdictions. Despite one commentator's conclusion that "[i]t is no more possible to encompass the scope of 'arbitrariness' within a single definition than to define satisfactorily 'reasonable care' or 'due process' or 'fraud,' "[100] it is useful to examine a

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by substantial evidence violates due process because of its inherently arbitrary character). *Cf.* Thomson v. Gallagher, 489 F.2d 443, 447 (5th Cir. 1973) (city ordinance mandating that veteran employees have honorable discharge ruled unconstitutional; "[t]he government must act, when it acts, in a manner which is neither arbitrary nor unreasonable"); Saffiotti v. Wilson, 392 F. Supp. 1335, 1344-46 (S.D.N.Y. 1975) (dictum) (governor's action in vetoing a bill that would have released petitioner on bail pending his appeal is not beyond due process); United States *ex rel.* Cameron v. New York, 383 F. Supp. 182, 184 (E.D.N.Y. 1974) (court decision pertaining to petitioner's right to be released on bail pending his appeal). *See generally* Vatjtauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927) (dictum) ("[D]eportation without a fair hearing or charges unsupported by any evidence is a denial of due process."). *See also* Thompson v. Louisville, 362 U.S. 199, 206 (1960) (conviction upon a charge unsupported by any evidence denies due process). For commentary on the issue of the constitutionality of administrative arbitrariness, see Berger, *Administrative Arbitrariness and Judicial Review,* 65 COLUM. L. REV. 55, 55-58, 82-83, 88-89 (1965); Berger, *Administrative Arbitrariness — A Reply to Professor Davis,* 114 U. PA. L. REV. 783, 785-86 (1966); Berger, *Administrative Arbitrariness: A Sequel,* 51 MINN. L. REV. 601, 603-04 (1967); Berger, *Administrative Arbitrariness: A Synthesis,* 78 YALE L.J. 965, 980-86 (1969); Davis, *Administrative Arbitrariness is Not Always Reviewable,* 51 MINN. L. REV. 643, 644-46, 650-51 (1967).

99. *See* Zannino v. Arnold, 531 F.2d 687, 690-91 (3d Cir. 1976); Wilwording v. Swenson, 502 F.2d 844, 851 (8th Cir. 1974), *cert. denied,* 420 U.S. 912 (1975); Drown v. Portsmouth School Dist., 451 F.2d 1106, 1108 (1st Cir. 1971); Canty v. Board of Educ., 312 F. Supp. 254, 256 (S.D.N.Y. 1970); Bayshore Sewerage Co. v. Department of Environmental Protection, 122 N.J. Super. 184, 199, 299 A.2d 751, 759 (1973), *aff'd per curiam,* 131 N.J. Super. 38, 328 A.2d 246 (1974).

Under federal APA standards, it appears that an administrative action must similarly rest on a rational basis in order to avoid being found arbitrary and capricious under 5 U.S.C. § 706(2)(A) (1976). *See* Bowman Transport, Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 284-86 (1974); Sabin v. Butz, 515 F.2d 1061, 1067 (10th Cir. 1975); Scanlan v. United States Army Test and Evaluation Command, 389 F. Supp. 65, 69-70 (D. Md. 1975) (dictum); Temple Univ. v. Associated Hosp. Serv., 361 F. Supp. 263, 270-71 (E.D. Pa. 1973); Bell Lines, Inc. v. United States, 263 F. Supp. 40, 46 (S.D. W. Va. 1967); Sterling Davis Dairy v. Freeman, 253 F. Supp. 80, 82 (D.N.J. 1965). Review under § 706(2)(A) necessitates inquiry into whether the administrative decision was based on "a consideration of all the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Thus, an agency's decision may be arbitrary and capricious even if it is supported by substantial evidence. 419 U.S. 281, 285-86 (1974).

100. Berger, *Administrative Arbitrariness and Judicial Review,* 65 COLUM. L. REV. 55, 82 (1965).

Some courts have even resorted to dictionary definitions. In First Nat'l Bank of Fayetteville v. Smith, 365 F. Supp. 898, 902-03 (W.D. Ark. 1973), *cert. denied,* 421 U.S. 930 (1975), the court said:

possible definition of the terms arbitrary and capricious, set out by one court as follows:

> "arbitrary" and "capricious" embrace a concept which emerges from the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and operates to guarantee that acts of government will be grounded on established legal principles and have a rational factual basis. A decision is arbitrary and capricious when it is not supported by evidence or when there is no reasonable justification for the decision.[101]

The due process embodied in this definition must be recognized as the substantive rather than procedural component of constitutional due process. In view of the reasonable procedural safeguards in effect, it is clear that due process claims in cases similar to *Clark* are based on substantive due process.[102]

It is a well-recognized principle of constitutional law that statutes must rest on a rational basis in order to comply with substantive due process requirements.[103] The notion that government action in the form of legislation must rest on a rational basis is similarly applicable to actions taken by administrative agencies.[104] As articulated by the Supreme Court, "[t]he touchstone of due process is the protection of the individual against arbitrary action of government."[105] This right to be free from arbitrary and

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> Capricious is defined as lacking a standard or norm, marked by variation or irregularity, lacking a predictable pattern, erratic or whimsical. Webster's Third New International Dictionary. Arbitrary is said to mean not rational or not done or acting according to reason or judgment. Black's Law Dictionary (Rev. 4th Ed.). The terms taken together, "arbitrary and capricious" has been defined as an act done without adequate determining principle or not done according to reason or judgment.

For a similar dictionary formulation of "arbitrary" action, see United States v. Carmack, 324 U.S. 230, 243 n.14 (1946).

101. Canty v. Board of Educ., 312 F. Supp. 254, 256 (S.D.N.Y. 1970).

102. The Clarks, it will be recalled, were permitted a hearing before the appeal tax court for Montgomery County, where they appeared with counsel and presented evidence and argument. State Dep't of Assess. & Taxation v. Clark, 281 Md. 385, 389, 380 A.2d 28, 31 (1977).

103. *See, e.g.*, North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 164-67 (1973); Ferguson v. Skrapa, 372 U.S. 726, 729 (1963); Thompson v. Gallagher, 489 F.2d 443, 447-49 (5th Cir. 1973).

104. *See* notes 97 to 99 and accompanying text *supra*.

105. Wolff v. McDonnell, 418 U.S. 539, 558 (1974). This statement appears in the context of a procedural due process discussion. *Cf.* Garrett v. City of Troy, 341 F. Supp. 633, 635-36 (E.D. Mich. 1972), *aff'd*, 473 F.2d 912 (6th Cir. 1973) (unpublished) (substantive due process protects against arbitrary action). Fundamentally, however, it must be recognized that there would be little purpose in ensuring proper procedural safeguards against arbitrary action if arbitrary results were constitutionally permissible. *See* Wilwording v. Swenson, 502 F.2d 844, 851 (8th Cir. 1974), *cert. denied*, 420 U.S. 912 (1975); McDonnell v. Wolff, 483 F.2d 1059, 1063 (8th Cir. 1973), *modified*, 418 U.S. 539 (1974).

capricious action has been recognized even when arbitrary action was not coupled with other constitutional rights,[106] and a few courts have recognized that an arbitrary and capricious deprivation of a "privilege" does not place the alleged conduct beyond the scope of substantive due process protection.[107] The fourteenth amendment, in short, has been regarded as a general prohibition against arbitrary and unreasonable government action.[108]

The notion that an official decision that is unsupported by evidence or lacking reasonable justification is arbitrary and capricious and thereby violative of substantive due process rights has potentially far-ranging implications. Although federal courts have applied this principle with greater frequency in the past several years, it remains clear that the substantive due process cases have been limited primarily to certain relatively well-defined areas.[109] Logically, such a limitation is not mandated; however, an obvious practical drawback to a wide application of the substantive due process doctrine is the possibility that administrative authorities would be placed in due process straightjackets.[110] Unless judicial review for substantive due process is strictly limited, the entire rationale of establishing agencies as entities capable of efficiently applying their expertise is jeopardized. The right to substantive due process should not be used to interfere with decisions properly left to the discretion of administrative authorities; it should be invoked only to the extent necessary to guarantee that administrative determinations rest on a rational basis.[111] Despite these limitations upon judicial review for compliance with substantive due process, however, it must be fully realized that due process issues may arise upon the commission of arbitrary administrative action. It should be evident that even if judicial review in *Clark* had been restricted to

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106. *See* Thompson v. Gallagher, 489 F.2d 443, 446-47 (5th Cir. 1973).

107. *Id.* Saffioti v. Wilson, 392 F. Supp. 1335, 1344-45 (S.D.N.Y. 1975); Beatham v. Manson, 369 F. Supp. 783, 791-92 (D. Conn. 1973). *Contra,* Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1, 3-5 (7th Cir. 1974) (absence of a claim that a liberty or property interest has been impaired will defeat a substantive due process claim).

108. *See* Thompson v. Gallagher, 489 F.2d 443, 447 (5th Cir. 1973); Nelson v. Southeastern Pa. Transp. Auth., 420 F. Supp. 1374, 1383 (E.D. Pa. 1976); Saffioti v. Wilson, 392 F. Supp. 1335, 1344-45 (S.D.N.Y. 1975).

109. *See* note 98 *supra.*

110. *Cf.* North Dakota Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 165 (1973) (quoting Lincoln Fed. Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 536-37 (1949)) (due process clauses should not be construed to prevent legislatures' regulation of conditions contrary to the public welfare).

111. Miller v. Dean, 430 F. Supp. 26, 29 (D. Neb. 1976), *aff'd,* 552 F.2d 266 (8th Cir. 1977). In *Miller,* the court pointed out that a consideration of some irrelevant evidence and a failure to make findings of fact did not, per se, constitute a due process violation when other substantiated reasons were adequate to support the action taken. One judge has suggested that the use of substantive due process as a basis for judicial review "inevitably has led to an unwarranted invasion of the duties and responsibilities of state and local governments." Strickland v. Inlow, 485 F.2d 186, 191-92 (8th Cir. 1973) (Mehaffy, C.J., dissenting from a denial of petition for rehearing en banc), *vacated sub nom.* Wood v. Strickland, 420 U.S. 308 (1975).

constitutional issues, the Court of Appeals should have permitted the circuit court to review allegations of arbitrariness in order to ensure administrative compliance with due process of law.

CONCLUSION

The *Clark* case is significant because of its definite restriction on the previously well-established inherent judicial power to review arbitrary, illegal, capricious, or unreasonable administrative decisions. *Clark* indicates that the Court of Appeals is less inclined than it has been in the recent past to exercise its constitutionally mandated power to check arbitrary administrative action. The present orientation of the court allows the exercise of inherent judicial power in this area only in "rare" instances.[112] Criticism has been directed at the court for its failure to perceive that *Clark* is essentially indistinguishable from *Gould,* and for its apparent resurrection of the right versus privilege doctrine. The comprehensive scheme analysis used to distinguish *Clark* from *Gould* seemingly permits insulation of administrative arbitrariness from review. Even more disturbing is the court's apparent treatment of the inherent power of judicial review as a common law power subject to legislative control rather than a constitutionally mandated power of the judiciary. Finally, a criticism has been leveled at the court's failure to realize that administrative arbitrariness may give rise to due process issues. Even if the inherent power to review is restricted to constitutional issues, the court should nevertheless have permitted, as a matter of substantive due process, review for arbitrariness. Whatever the long-range impact of *Clark,* it is clear that the Court of Appeals has in effect granted supervisors of assessments, directors of finance, and the appeal tax courts the opportunity to determine abatements arbitrarily.

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112. Maryland-Nat'l Capital Park and Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 608, 386 A.2d 1216, 1224 (1978).

GENERAL AND SPECIFIC INTENT: THE IMPLICATIONS FOR VENUE IN CRIMINAL CASES — *McBURNEY v. STATE*

The distinction between specific and general intent crimes has long been significant in criminal law.[1] In *McBurney v. State*[2] the Maryland Court of Appeals applied this distinction in a novel fashion. It stated that at common law, venue for a criminal case exists in the county where the offense was committed. With respect to general intent crimes, the court claimed that venue lies where the alleged acts constituting the crime were committed. It indicated, however, that a specific intent crime might be "committed" in several places and at several times, and that proper venue in a case involving a specific intent crime might therefore lie in a jurisdiction other than the one where the alleged criminal acts occurred.[3] As will be discussed, distinguishing between specific and general intent crimes for venue purposes is inappropriate.

John J. McBurney was counsel for the O'Connor Construction Company (O'Connor), a company that had agreed to perform certain construction work for the Cameron-Brown Company (Cameron-Brown). Pursuant to the agreement, Cameron-Brown sent a check for $8,000 to McBurney's office in Prince George's County, Maryland, instructing McBurney to release this money to O'Connor when O'Connor commenced the agreed-upon work. McBurney acknowledged receipt of the check and promised to comply with Cameron-Brown's instructions.[4] After holding the check for about one week, McBurney deposited it in his bank account in Montgomery County, Maryland and used the account for numerous transactions in his legal practice — other than for keeping escrow funds.[5] Some time later he withdrew funds from the account for reasons unrelated to the O'Connor/Cameron-Brown agreement, reducing the balance below $8,000. In reducing the account's balance below $8,000, McBurney necessarily appropriated part of the O'Connor/Cameron-Brown funds to his own use.[6]

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1. *See* W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 5.06 (7th ed. 1967); R. PERKINS, CRIMINAL LAW 762-64 (2d ed. 1969).

2. 280 Md. 21, 371 A.2d 129 (1977).

3. *Id.* at 30-32, 371 A.2d at 134-35.

4. *Id.* at 24, 371 A.2d at 131.

5. "The monies in that account were used for other things, for example, his secretary's salary and other office expenses of various kinds." *Id.* at 25, 371 A.2d at 131.

6. After the company had begun construction, McBurney had two conversations with the president of O'Connor regarding the release of the $8,000. At his trial, McBurney testified that, as a result of the conversations, he thought he had received permission to borrow the money to loan to the business of the mother of his secretary. O'Connor's president testified that no such permission had been granted. After the second conversation, McBurney, in Montgomery County, issued a check, drawn on the Montgomery County account, to his secretary's mother's business. The issuance of the check reduced the balance in McBurney's account to less than $8,000. *Id.* at 25-26, 371 A.2d at 131-32.

Article 10, section 44(a) of the Maryland Annotated Code[7] prohibits an attorney from commingling funds entrusted to him with his own funds and also prohibits an attorney from using funds entrusted to him for any purpose other than that for which they were entrusted. Section 44(c) makes any willful violation of section 44(a) a misdemeanor. Thus, by his acts McBurney committed two crimes: commingling the O'Connor/Cameron-Brown funds entrusted to him with his own funds, and using part of these entrusted funds for his own purpose.

The Prince George's County Grand Jury indicted McBurney for six offenses related to this transaction, including the two violations of section 44.[8] Before trial, McBurney filed a motion to dismiss the indictment for improper venue,[9] claiming that his alleged crimes took place in Montgomery rather than Prince George's County, that the Prince George's County Grand Jury therefore could not indict him, and that the Prince George's County Circuit Court was thus an improper forum in which to try him. The circuit court denied the motion,[10] and McBurney was ultimately convicted of the two section 44 charges. He appealed, assigning error to the denial of his motion to dismiss for improper venue.[11] The Maryland Court of Appeals, after issuing a writ of certiorari prior to decision in the Court of Special Appeals,[12] held that section 44 offenses were general intent crimes occurring in only one place for venue purposes. Upon examining the facts in

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7. MD. ANN. CODE art. 10, § 44 (1976), in pertinent part, provides:

> (a) If any attorney is entrusted with, or receives and accepts, or otherwise holds, deposit moneys or other trust moneys, of whatever kind or nature, such moneys, in the absence of written instructions or court order to the contrary shall be expeditiously deposited in an account maintained as a separate account or accounts for funds belonging to others. In no event shall he commingle any such funds with his own or use any such funds for any purpose other than the purpose for which such funds were entrusted to him.
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> . . . .
>
> (c) Any attorney wilfully violating the provisions of this section, in addition to the penalties [reprimand, suspension, or disbarment] set forth in subsection (b) hereof, shall be guilty of a misdemeanor for each such violation and on conviction thereof, shall be fined not more than five thousand dollars ($5,000.00) or be imprisoned for not more than five (5) years, or both in the discretion of the court.

The statute had been cited in two earlier cases for reasons unrelated to a prosecution under its provisions. In neither case was venue an issue. *See* Bar Ass'n v. Cockrell, 274 Md. 279, 284, 334 A.2d 85, 87 (1975); Andresen v. Bar Ass'n, 269 Md. 313, 327, 305 A.2d 845, 854, *cert. denied,* 414 U.S. 1065 (1973).

8. *Id.* at 23, 371 A.2d at 130. McBurney was found not guilty of misappropriation of funds as a fiduciary and of larceny after trust. After the trial commenced, a *nolle prosequi* was entered as to counts charging false pretenses and attempted false pretenses. *Id.* at 23 n.1, 371 A.2d at 130 n.1.

9. *Id.* at 27, 371 A.2d at 132-33. *See generally* MD. R.P. 725b.

10. 280 Md. at 27-28, 371 A.2d at 132.

11. *See id.* at 28, 371 A.2d at 133.

12. *Id.* at 23, 371 A.2d at 131. *See generally* MD. CTS. & JUD. PROC. CODE ANN. § 12-201 (Cum. Supp. 1977); MD. CTS. & JUD. PROC. CODE ANN. § 12-203 (1974).

McBurney's case the court concluded that the two offenses had occurred in Montgomery County. Because the court found that venue in Prince George's County was improper, it dismissed the counts of the indictment relating to the section 44 offenses.[13]

Judge Orth, writing for the court, began his analysis of the case by stating that the crimes of which McBurney had been convicted occurred in Montgomery County rather than Prince George's County. He pointed out that these crimes required only a general intent, and not a specific intent, for section 44 merely requires an intent to do the proscribed actus reus,[14] while " 'some intent other than to do the *actus reus*' "[15] of the crime is needed to create a specific intent crime.[16]

Having thus established that the crimes defined in section 44 require general rather than specific intent, the court relied on this fact to distinguish *McBurney* from a line of embezzlement cases upon which the state had relied in asserting that venue in Prince George's County was proper. Quoting *Martel v. State*,[17] the opinion implied that these cases established that " '[i]n embezzlement, the rule is that proper venue is the county where the act of appropriation or conversion took place, or where the intent to embezzle was formed, or where the property was entrusted, or where the accused is under an obligation to account,' "[18] but declined to analogize section 44 offenses to embezzlement for venue purposes. Instead, Judge Orth emphasized that, unlike section 44 offenses, embezzlement is a specific intent offense, stating that the specific intent element in embezzlement is " 'a fraudulent intent to deprive the owner of his property,' "[19] and that "[i]t is because of this specific intent element that embezzlement may be 'committed' in several places and at several times."[20] Thus, the court concluded that venue for general intent crimes (such as section 44 offenses), unlike venue for specific intent crimes (such as embezzlement), is proper in only one place: where the actus reus concurs with the mens rea, that is, the place of the crime.

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13. 280 Md. at 28-34, 371 A.2d at 133-37. The court declined to decide whether the Grand Jury for Prince George's County had subject matter jurisdiction in the case. *Id.* at 31 n.8, 371 A.2d at 135 n.8. It also did not consider the sufficiency of the evidence to sustain the convictions. *Id.* at 35, 371 A.2d at 137.

14. "The *actus reus* in the one crime is the commingling of entrusted funds with an attorney's own funds; in the other crime it is the use of entrusted funds by an attorney for any purpose other than the purpose for which they were entrusted to him." 280 Md. at 29, 371 A.2d at 134.

15. *Id.* at 29, 371 A.2d at 133 (quoting R. PERKINS, *supra* note 1, at 762).

16. The court noted the provision that an attorney must "wilfully" violate the statute does not create a specific intent element in the crime, whether "wilfully" is defined as "intentionally" or "with a bad purpose." 280 Md. at 29, 371 A.2d at 134.

17. 221 Md. 294, 157 A.2d 437, *cert. denied*, 363 U.S. 849 (1960).

18. 280 Md. at 30, 371 A.2d at 134 (quoting Martel v. State, 221 Md. 294, 299, 157 A.2d 437, 440, *cert. denied*, 363 U.S. 849 (1960)).

19. 280 Md. at 30, 371 A.2d at 134 (quoting W. CLARK & W. MARSHALL, *supra* note 1, § 5.06).

20. 280 Md. at 30, 371 A.2d at 134.

The Court of Appeals stressed that the issue raised in *McBurney* was proper venue and not the subject matter jurisdiction of the Prince George's County court.[21] It stated that the common law rule of venue — that venue is proper only in the county in which the crime was committed — is in force in Maryland,[22] and reiterated that the appropriate county for venue in the case before it was Montgomery County. Because McBurney had made timely objection to the Prince George's County venue of his trial, the Court of Appeals reversed his conviction and dismissed both section 44 counts of the indictment.[23]

The rationale for the *McBurney* decision can be reduced to three propositions: (1) the common law rule in Maryland is that venue lies where a crime is committed; (2) specific intent crimes such as embezzlement may be committed in more than one place, but general intent crimes can be committed in only one place, where the actus reus and mens rea conjoin; and (3) violation of section 44 is a general intent crime. The first and third of these propositions appear to be well founded. With regard to the first, venue in the county of the commission of a crime, though not mandated by statute or by any provision of the state's constitution,[24] is clearly the general rule and accepted in Maryland.[25] With regard to the third, section 44 offenses do appear to be general intent rather than specific intent offenses: as stated by

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21. *Id.* at 31-33, 371 A.2d at 135-36. *See generally* MD. CTS. & JUD. PROC. CODE ANN. § 1-501 (1974).

22. 280 Md. at 32, 371 A.2d at 135. Many states have codified the common law rule. *See* 1 WHARTON'S CRIMINAL PROCEDURE § 36 n.2 (C. Torcia ed. 1974).

23. 280 Md. at 33-34, 371 A.2d at 136-37. *See generally* MD. R.P. 875a.

24. *See* Kisner v. State, 209 Md. 524, 530, 122 A.2d 102, 105 (1956). *See generally* MD. CONST., Decl. of Rts., art. 20, which provides "[t]hat the trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the People." Article 20 has been interpreted as being too indefinite to confer any general right to trial in the county of a crime's commission. Stewart v. State, 21 Md. App. 346, 350-51, 319 A.2d 621, 623 (1974), *aff'd*, 275 Md. 258, 340 A.2d 290 (1975); Blume, *The Place of Trial of Criminal Cases*, 43 MICH. L. REV. 59, 69-70, 93 (1944).

25. *See* note 22 and accompanying text *supra*.

> As one court has put it, the purpose [of the common law rule] is "to secure the party accused from being dragged to a trial at a distant part of the state, away from his friends and witnesses and neighborhood, and thus to be subject to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him, as well as the necessity of incurring the most oppressive expenses, or perhaps, even to the inability of procuring the proper witnesses to establish his innocence."

1 WHARTON'S CRIMINAL PROCEDURE § 36, at 106 (C. Torcia ed. 1974) (quoting State v. Robinson, 14 Minn. 447, 454-55, (1869)). *See* United States v. Cores, 356 U.S. 405 (1958). The General Assembly has the power to prescribe venue in any county for a crime, but it has not exercised the power with respect to violations of § 44 as it has with respect to some other crimes. *See* Kisner v. State, 209 Md. 524, 531-32, 122 A.2d 102, 106 (1956); MD. ANN. CODE art. 27, §§ 586-590 (1976).

the court, section 44 of article 10 appears to require no intent other than to perform the proscribed actus reus.[26]

The court was unpersuasive, however, when it sought to justify its conclusion that the crimes were not committed in Prince George's County (and thus that venue was improper there) on the ground that the crimes required merely a general intent. Three flaws exist in its analysis. First, if venue properly exists only where the crimes occurred (the common law test the court purports to follow), a defendant's mere intent, whether specific or general, should be insufficient to create venue. A basic premise of American criminal law is that

> [t]he law does not deal with a man's inner feelings and unexecuted purpose and intentions. A mere criminal or guilty intent to do an act . . ., not connected with an overt act or outward manifestation, is not in and of itself a crime, and with it the law has no concern.[27]

Thus, as the Court of Appeals has recognized,[28] intent alone is insufficient to constitute a crime. Absent commission of a new actus reus, the mere existence of mens rea should not be sufficient to establish venue.

Second, even if, as the court argued, intent is sufficient to create venue, no reason exists for limiting the consideration of intent to cases involving specific intent crimes. As in the case of a specific intent crime, the intent to perform the actus reus of a general intent crime may exist independently of the commission of the actus reus. The various locations where such general

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26. *See* notes 13 to 15 and accompanying text *supra*. *See generally* W. CLARK & W. MARSHALL, *supra* note 1, § 5.06.

27. WHARTON'S CRIMINAL LAW § 152 (J. Ruppenthal ed. 1932). *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 25 (1972), which states:

> Several reasons have been given in justification for the requirement of an act. One is that a person's thoughts are not susceptible of proof except when demonstrated by outward actions. . . . Another reason given is the difficulty in distinguishing a fixed intent from mere daydream and fantasy. Most persuasive, however, is the notion that the criminal law should not be so broadly defined to reach those who entertain criminal schemes but never let their thoughts govern their conduct.

The mere existence of a criminal intent and a prohibited act, moreover, does not always create a crime. The mens rea and actus reus must merge so that the mens rea actuates the actus reus. *Id.* § 34; R. PERKINS, *supra* note 1, at 835. In effect, the required relationship between the mens rea and the actus reus is that they concur in time. W. CLARK & W. MARSHALL, *supra* note 1, § 5.02; L. HOCHHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE § 7 (2d ed. 104). *Contra,* W. LAFAVE & A. SCOTT, *supra* § 34; R. PERKINS, *supra* note 1, at 835. The requirement is applicable to all crimes except those that have no mens rea element. *See* W. CLARK & W. MARSHALL, *supra* note 1, § 5.10. McBurney's crimes were not such "strict liability" offenses because wilfullness was required as an element.

28. " '[T]here are two components of every crime: one of these is objective, the other is subjective; one is physical, the other is psychical; one is the *actus reus,* the other is the *mens rea* [*e.g.,* intent].' " *Id.* at 28–29, 371 A.2d at 133 (quoting R. PERKINS, *supra* note 1, at 743).

intent existed independently of the actus reus would therefore appear to be as appropriate for venues as the locations where a specific intent existed independently of the actus reus element of a specific intent crime.

Finally, the embezzlement cases on which the court relied do not support *McBurney*'s reasoning or result. As previously noted, *Martel v. State*[29] lists as appropriate venues for embezzlement: (1) the county where the act of appropriation or conversion occurred; (2) where the intent to embezzle was formed; (3) where the property was entrusted; and (4) where the accused is under an obligation to account.[30] The first of these is the traditional place of venue: where act and intent conjoin. The second basis of venue, though close to the *McBurney* court's position, makes no mention of the specific intent nature of embezzlement, and the court's opinion offers no principled basis for distinguishing between general and specific intent in this context. The third and fourth, moreover, have nothing to do with the existence of intent. Thus, the court appears to be stretching precedent to a very substantial extent in using the line of embezzlement cases to develop a dichotomy between specific and general intent crimes for venue purposes.

The weakness of *McBurney*'s analysis is indicated further by the failure of any other case to adopt its analysis. No prior case in Maryland or any other jurisdiction examined by the writer has argued that the fact that "the crimes here considered do not have a specific intent as an essential ingredient is pertinent to the consideration of where they were committed."[31] Similarly, in no case involving a specific intent crime has the Court of Appeals predicated the propriety of venue upon the specific intent nature of the crime.

THE EMBEZZLEMENT CASES

The *McBurney* court's analysis may be misguided, but it was not developed in a vacuum. The court derived its analysis from the line of Court of Appeals cases recognizing four appropriate venues for embezzlement,[32] three of which deviate from the common law rule purportedly followed in Maryland. In examining the embezzlement cases, two questions must be resolved. First, was the court's deviation from the common law rule appropriate in those cases? Second, if such deviation is in fact proper, should *McBurney* have followed the deviation rather than the common law rule?

The Maryland venue rule for embezzlement ultimately derives from *Bowen v. State*.[33] In *Bowen*, the Court of Appeals reversed the convictions of

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29. 221 Md. 294, 157 A.2d 437, *cert. denied*, 363 U.S. 849 (1960).

30. *Id.* at 299, 157 A.2d at 440.

31. 280 Md. at 30, 371 A.2d at 134.

32. *See generally* R. PERKINS, *supra* note 1, at 286–95.

33. 206 Md. 368, 111 A.2d 844 (1955). Bowen, in his capacity as president of a title company, had received certain funds in Montgomery County. He later deposited the funds in the company's trustee account in Washington, D.C., and subsequent

a defendant who had been found guilty in Montgomery County of embezzlement[34] and larceny after trust.[35] Although it reversed the convictions on the ground that the crimes were committed out of state, and thus that Maryland lacked subject matter jurisdiction, the court devoted a substantial portion of its opinion to answering the prosecution's contentions regarding venue. The state had argued that venue for embezzlement could properly exist not only in the county where the act of conversion occurred (the traditional common law venue), but also where the fraudulent intent to convert was formed, where the defendant was under an obligation to account for the money, or where the money was received. The court emphasized that its opinion did not decide whether proper venue lies where an intent to convert is formed or where an obligation to account exists, because it concluded that, even if the state's contentions were correct, there was insufficient evidence to show that any of the actions necessary to establish these venues had occurred in Montgomery County.[36] In answer to the state's final contention, that venue is proper where the money was received, the court noted that the case relied upon by the state[37] merely held that an intent to convert is *presumed* to have been formed where the money was received. Without indicating whether it approved of such a presumption, the Court of Appeals stated that "there was not sufficient evidence to show any intent to convert the money" when it was received in Montgomery County.[38]

Despite *Bowen*'s clear refusal to determine whether venue is appropriate in places other than where the act of conversion occurred, *Martel v. State*[39] relied on *Bowen* for the proposition that venue is equally appropriate where the fraudulent intent to convert was formed, where the defendant was under an obligation to account, and where the money was received. Martel had been a bartender at a club in Frederick County, Maryland. He was convicted of larcency after trust, an offense similar to embezzlement,[40] for converting to his own use club funds entrusted to him. Martel argued that the state had never proven proper venue existed in Frederick County. The court cited *Bowen*[41] as support for its statement that venue in embezzlement cases is

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withdrawals were made in Washington which led to the embezzlement and larceny after trust charges. 206 Md. at 372-74, 111 A.2d at 845-47.

34. *See* MD. ANN. CODE art. 27, § 154 (1951) (current version at MD. ANN. CODE art. 27, § 129 (1976)).

35. *See* MD. ANN. CODE art. 27, § 420 (1951) (current version at MD. ANN. CODE art. 27, § 353 (Cum. Supp. 1977)).

36. 206 Md. at 375-79, 111 A.2d at 847-49. The court concluded that Bowen had no intent to embezzle or an obligation to account in Montgomery County.

37. Denmark v. State, 44 Ga. App. 157, 161 S.E. 286 (1931).

38. 206 Md. at 378, 111 A.2d at 848.

39. 221 Md. 294, 157 A.2d 437, *cert. denied*, 363 U.S. 849 (1960).

40. *Compare* MD. ANN. CODE art. 27, § 129 (1976) *with* MD. ANN. CODE art. 27, § 353 (Cum. Supp. 1977).

41. 221 Md. at 299, 157 A.2d at 440. The court also relied upon 18 AM. JUR. *Embezzlement* § 65 (1938), which does support its venue rule.

appropriate not only at the place of conversion, but also in the three locations whose legitimacy as venues *Bowen* had refused to decide. Without indicating which set of requirements Frederick County met, the *Martel* court stated that there was evidence from which the jury could find that any or all of the venue standards were met by that county.[42]

Martel clearly misapplied *Bowen* in citing it to support the proposition that venue is proper in counties other than where the act of conversion occurred. Nevertheless, *Martel* provided a basis in Maryland for establishing venue for embezzlement and similar offenses in places other than that provided under the traditional common law rule. The *Martel* rule was discussed and expanded in *Peddersen v. State*.[43] Peddersen managed his employer's farm in Montgomery County, and pursuant to his duties, sold some cows in Pennsylvania. After failing to deliver the proceeds of the sale to his employer for four days, Peddersen fled Maryland to avoid an unrelated suit. Unfortunately, he failed to deliver the proceeds to his employer before fleeing and consequently was indicted and convicted of embezzlement in the Circuit Court for Montgomery County.[44] On appeal Peddersen asserted that because no embezzlement was committed in Montgomery County, and because the jury was improperly instructed that venue was appropriate where the intent to embezzle was formed, his conviction should be reversed.[45] The Court of Appeals disagreed and affirmed the conviction, holding that venue is proper where there is evidence to show that the defendant had possession of the money or property appropriated in the indicting county, and also evidence exists to support an inference that the fraudulent intent to embezzle had been formed in the same county.[46]

In so holding, the Court of Appeals explicitly rejected the requirement that the actus reus of embezzlement, conversion of the property, need have occurred in the county asserting jurisdiction and venue. The court agreed with the assertion of Clark and Marshall that:

> The offense [of embezzlement] is complete whenever a person who has been intrusted . . . [with money or property] forms an intent to convert it to his own use, and has possession with such intent. A person, therefore, may be indicted for embezzlement in the jurisdiction in which

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42. In answer to Martel's objection to venue in Frederick County, the court said:
Almost always in the case of embezzlement, the determination of guilt must be inferential. There was evidence here from which the jury could find that any one, or all, of the necessary standards [as stated in text accompanying note 47 *infra*] were met as to Frederick County.
221 Md. at 299, 157 A.2d at 440.
43. 223 Md. 329, 164 A.2d 539 (1960).
44. *Id.* at 330–32, 164 A.2d at 540–41.
45. *Id.* at 332, 164 A.2d at 541.
46. *Id.* at 337, 164 A.2d at 544.

> he had possession of the property or money with intent to convert it to his own use . . . .[47]

It went on to note that other jurisdictions did not require the actual act of appropriation to occur within the territorial jurisdiction of the court if fraudulent intent could be shown to have been formed in the county where the property was received or in a county in which the property was possessed.[48] Finally, the *Peddersen* court quoted *Martel* to indicate that previous Maryland authority supported this position. Rather than merely relying upon *Martel,* however, the court expanded its prior decision. It pointed out that the authorities it had discussed clearly indicated that intent is the "essential element" in embezzlement and that venue for that crime lies in the county where money or property was received with intent to embezzle, or where money or property was possessed and the intent to embezzle was formed, "regardless of the fact that actual conversion may have taken place in another county or state."[49]

The *Pedderson* court's holding that intent plus possession is sufficient to establish venue in embezzlement cases[50] is inconsistent with the notion that venue lies where a crime is committed: possession of another's money or goods, without more, cannot reasonably be viewed as an act sufficient to constitute the actus reus of embezzlement. Mere *intent* to convert, when coupled with possession, cannot deprive the owner of his money or property. Such a deprivation occurs only when the accused goes beyond an intent to convert and takes some action that constitutes a use or holding adverse to the owner's interest in the money or property. Because an accused embezzler originally has lawful possession of the money or property, the actus reus of embezzlement (conversion) cannot consist of possession alone. As discussed previously, criminalizing a mere mental state — the intent to embezzle — is unacceptable in our society.[51] By emphasizing intent as the critical element

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47. *Id.* at 335, 164 A.2d at 543 (quoting W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 3.02 (6th ed. 1958)).

48. The court cited, as support for its position, People v. Goodrich, 142 Cal. 216, 75 P. 796 (1904); People v. Brock, 21 Cal. App. 2d 601, 70 P.2d 210 (1937); State v. Serkau, 128 Conn. 153, 20 A.2d 725 (1941); Woodward v. United States, 38 App. D.C. 323 (1912); Heughan v. State, 82 Ga. App. 640, 61 S.E.2d 685 (1950); Maynard v. State, 47 Ga. App. 221, 170 S.E. 265 (1933); State v. Sullivan, 49 La. Ann. 197, 21 So. 688 (1896); Brown v. State, 23 Tex. Crim. 214, 4 S.W. 588 (Crim. App. 1887).

49. 223 Md. at 337, 164 A.2d at 544.

50. *Peddersen's* reliance upon W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 3.02 (6th ed. 1958) to support its venue rule is hardly persuasive in view of the inconsistency within that treatise. *Compare id.* § 3.02 (*see* text accompanying note 47 *supra*) *with id.* § 12.21 ("To constitute a conversion so as to make out a case of embezzlement, the owner must be deprived of his money or property by an adverse using or holding. Mere secreting of property with intent to convert it is not enough."). Ironically, the *Peddersen* court refused to be influenced by a treatise relied upon by the defendant in that case because, in part, of an inconsistency (nearly identical to that in W. CLARK & W MARSHALL, *supra* §§ 3.02, 12.21) within the treatise. *See* 223 Md. at 334, 164 A.2d at 542-43.

51. *See* note 27 and accompanying text *supra.*

in embezzlement and by formulating its purported holding in terms not requiring that the embezzlement have been committed in the county of venue, the *Peddersen* court made possible *McBurney*'s unjustified distinction between specific and general intent crimes for venue purposes.[52]

Neither the suspect origin of the *Martel* rule in a misapplication of *Bowen* nor the emphasis upon intent in *Peddersen,* however, make the venue rules stated in those cases valueless. In a crime such as embezzlement, the elements of which are the fraudulent intent to convert property plus a conversion of the property, the place at which intent (mens rea) and conversion (actus reus) conjoin to create an offense may be extremely difficult, if not impossible, to prove. For example, *A* might travel through one county collecting money for his employer, return home to another county, and fail to turn the money over to his employer (without evidence that he lost or was robbed of the money). The intent to convert the money might have been formed in either county, but absent proof of some use of the money inconsistent with the employer's ownership (an act of conversion), it would be impossible to show where the crime actually occurred. The intent could not be presumed from the fact of possession, for *A* had a right to possess the property. In such a situation, under a strict application of the common law venue rule, an accused who had clearly embezzled the property within the state could not be tried because no appropriate venue could be established. Rather than permit such a result to occur, a court might find venue in such cases by presuming that actus reus and mens rea concurred in a county where there is some likelihood that they did in fact concur, or by establishing venue in a place bearing some relationship to the crime. A Louisiana case, *State v. Cason,*[53] demonstrates how such a rule might be applied:

> [I]n view of the difficulty of stating with exactness (in some cases) the place where the felonious conversion occurred, the courts have established certain legal presumptions which, if not rebutted by other evidence, suffice to vest jurisdiction in a particular court. Thus, it will be presumed that the illegal conversion was accomplished in the jurisdiction of the court where the money was entrusted to the accused or at the place at which an accounting is to be made . . . . But these presumptions can be indulged in only in the absence of proof showing that the conversion of the monies took place within another jurisdiction . . . .[54]

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52. The *McBurney* court also relied upon Urciolo v. State, 272 Md. 607, 325 A.2d 878 (1974). 280 Md. at 30, 371 A.2d at 134. *Urciolo* reviewed with approval the decisions in *Bowen, Martel,* and *Peddersen,* and, as in *Bowen,* the court left open the possibility that venue might be proper in the county in which an accused is under a duty to account. 272 Md. at 640, 325 A.2d at 896-97. Like the court in *Martel,* the *Urciolo* court found support in *Bowen* for the *Martel* rule despite the fact that *Bowen* provided no such support. *Id.* at 623, 325 A.2d at 888.

53. 198 La. 828, 5 So. 2d 121 (1941).

54. *Id.* at 832, 5 So. 2d at 123. Though the court in *Cason* was bound by Louisiana's constitution and code of criminal procedure, the constitution and code

The three proper embezzlement venues, in addition to the place of conversion, approved of in *Martel*[55] might well be used as such presumptions. The place where the fraudulent intent was formed obviously bears some relationship to the crime. Entrustment to an accused initiates his possession of the money or property and, regardless whether possession is viewed as a sufficient act to constitute the actus reus of embezzlement, the act of possession, when coupled with the requisite intent, gives the accused the ability to commit the crime. Finally, the time and place of accounting mark the point by which the crime will almost certainly have occurred. At such time the embezzler will either fail to account or account improperly so as to conceal his defalcation.

Application of presumptions of this sort should not be restricted to embezzlement cases. In fact, similar presumptions would be appropriate whenever the exact locus of a crime is sufficiently unclear so that adhering to the common law venue rule is difficult or impossible. In *McBurney,* the use of the *Cason* approach would have obviated any reason for relying upon the inappropriate distinction between specific and general intent crimes for venue purposes. Had McBurney commingled his funds with those of his clients and misused the funds in a fashion that made determining the county of commingling and misuse impossible, resort to a presumption establishing venue in some place having a relevant connection to the transaction might have been appropriate. The fact that the place of commingling and misuse was clear, however, made resort to any such presumption unnecessary. This reason for not resorting to a presumption in *McBurney,* however, stems from the ease of proving the locus of the crime, *not* from its character as a general intent crime.

CONCLUSION

McBurney's conclusion that classification of a crime as one requiring either general or specific intent is relevant to determining proper venue cannot be supported. Because the court purported to adhere to the rule that venue lies where a crime is committed, and because a crime cannot be committed without some kind of act, consideration of the nature of the intent required for a particular crime is irrelevant for ascertaining venue. Intent alone cannot determine where a crime is committed. Even if the courts were to base venue solely on the fact that the intent element of the crime occurred in a particular county, the *McBurney* opinion provides no justification for distinguishing between specific and general intent crimes.

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were essentially codifications of the traditional common law venue rule. *See* LA. CONST. of 1921, art. 1, § 9; LA. REV. STAT. ANN. § 15:13(A) (West 1928) (current version at LA. CODE CRIM. PRO. ANN. art. 611 (West 1967)). *See also* State v. Mispagel, 207 Mo. 557, 106 S.W. 513 (1907).

55. *See* text accompanying note 18 *supra.*

Despite their shortcomings, *McBurney* and the embezzlement cases on which it relies highlight the need for a venue concept that recognizes the frequently difficult task of determining where certain crimes are committed. This need is not served, however, by focusing on the nature of the intent element of the crime. Nor is it appropriately served by arbitrarily creating additional venues for offenses when ascertaining the locus of the crime is a likely problem. Rather, the focus should be on the difficulty in establishing the locus of a particular crime with which a particular defendant is charged. If the place where the actus reus and mens rea concurred can be determined to the court's satisfaction, the traditional venue rule should be applied. If such a determination is impossible, alternate venues might appropriately be allowed based upon some relationship of the venue to the offense or a degree of likelihood that the crime occurred in the venue. This approach complements rather than contradicts the traditional common law rule of venue: it utilizes the rule when the place of the crime's commission can be established. At the same time, it eliminates the possibility that no proper venue would exist because the site of the actus reus is uncertain.

McBurney focused on an inappropriate distinction between classes of crimes. The approach developed in the line of cases upon which *McBurney* based the distinction, however, served a legitimate function: it supplemented the common law venue rule in a type of case that did not seem to satisfy the traditional rule. Understanding this function makes possible the use of the embezzlement cases to solve similar problems in other crimes, for example, in determining the locus of the actus reus in some kidnapping-murder cases, and permits limiting the application of the embezzlement cases to situations in which their use is appropriate.

WAIVER OF RIGHT TO COUNSEL: MARYLAND'S APPLICATION OF *BREWER v. WILLIAMS* — *WATSON v. STATE*

Donald Ray Watson was arrested for armed robbery and use of a handgun in the commission of a crime of violence and retained private counsel. Unsure of Watson's guilt, Detective John Hopkins spoke with Watson's attorney on the day of Watson's second preliminary hearing and suggested that a polygraph examination be conducted. Watson's attorney agreed to this suggestion and informed his client that he was not under any circumstances "to give any statement beyond the polygraph examination."[1] Hopkins also agreed with the attorney that he would question Watson only to the extent necessary to conduct the polygraph examination.[2]

When the test was over the polygraph operator told Watson that he had failed and then telephoned Hopkins to inform him that Watson had failed and wanted to talk to him. Arriving twenty minutes later from another office, Hopkins informed Watson that he had twice been unable to reach Watson's attorney and stated: "I understand you have something you want to tell me, but, first of all, I'm going to read your rights again."[3] Watson was then informed of his *Miranda*[4] rights for the third time.[5] After stating that he understood his rights, Watson declared that he wished to talk to the detective and wanted to "get something off his chest."[6] An inculpatory statement followed. In ruling on Watson's motion to suppress this statement, the trial judge found that it was voluntarily given and, therefore,

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1. Watson v. State, 282 Md. 73, 75, 382 A.2d 574, 576 (1978).

2. Further, Hopkins agreed to call Watson's attorney to inform him of the test results. Brief for Appellant at 3, Watson v. State, 282 Md. 73, 382 A.2d 574 (1978).

3. 282 Md. at 76, 382 A.2d at 576.

4. Miranda v. Arizona, 384 U.S. 436 (1966). In order to protect an individual's fifth amendment privilege against compelled self-incrimination and to insure that any statement will be made voluntarily, *Miranda* imposed procedural safeguards in the form of warnings as a precondition to the admissibility of a confession or inculpatory statement resulting from a custodial interrogation. *Miranda* requires that prior to any custodial interrogation the individual be warned that: he has the right to remain silent; anything he says can be used against him in a court of law; he has the right to the presence of an attorney; and if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. *Id.* at 444.

5. 282 Md. at 76, 382 A.2d at 576. Watson had received *Miranda* warnings at the time of his arrest and again at a post-arrest interrogation. *Id.* at 75, 382 A.2d at 575.

6. *Id.* at 76, 382 A.2d at 576.

admissible.[7] Watson was subsequently convicted, and the Court of Special Appeals affirmed his conviction.[8]

Relying on the intervening Supreme Court decision of *Brewer v. Williams*,[9] Watson appealed to the Court of Appeals on the ground that his statement had been obtained without an effective waiver of his right to counsel.[10] A four-judge majority, speaking through Judge Smith, rejected

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7. *Id.* at 77, 382 A.2d at 577. Although the trial court's findings of fact agreed with the state's version of the incident, Watson offered a significantly different version of the events preceding the statement. He testified that he did not request to see Detective Hopkins. Moreover, he denied that he had made the inculpatory statement and stated that his request to call his attorney had been ignored. *Id.* at 76, 382 A.2d at 576. In his brief to the Court of Appeals, however, Watson admitted that he had made the inculpatory statement. Brief for Appellant at 7. The trial judge stated:

> "I don't believe the sequence of events as described to me by the defendant in this case. I will say, however, that the statements given by the defendant do not indicate to me that he was put upon or lulled into some kind of sense of false secutity by virtue of having been administered a polygraph test . . . . I think that the statement was given voluntarily with the understanding of his *Miranda* rights, and having been given good advice by his counsel, he chose to ignore it at that particular time . . . . I will rule that the statement given on February 11th, '76, is admissible."

282 Md. at 77-78, 382 A.2d at 577.

8. 35 Md. App. 381, 370 A.2d 1149 (1977), *aff'd*, 282 Md. 73, 382 A.2d 574 (1978). According to the Court of Special Appeals, the sole question was whether Watson's statement was the product of a free and unconstrained will that had not been overborne or compelled. 35 Md. App. at 384, 370 A.2d at 1150-51. The court rejected Watson's suggestion that his statement was the involuntary result of the coercive atmosphere generated by the lie detector examination, *id.* at 385, 370 A.2d at 1151; *cf.* Johnson v. State, 31 Md. App. 303, 305, 355 A.2d 504, 506 (1976) (polygraph examination purposely used to elicit incriminating statement may be considered by jury as evidence that statement was given involuntarily), finding that Watson had voluntarily agreed to take the test. 35 Md. App. at 385, 370 A.2d at 1151. In addition, the court noted that in spite of the alleged coercive effect of having failed the examination, Watson's inculpatory statement was at least partially exculpatory. The Court of Special Appeals was apparently of the opinion that Watson's partial attempt to exonerate himself refuted any suggestion that he was incapable of voluntarily determining whether to make the statement. *See id.*

The court also rejected Watson's contention that once an accused is represented by counsel, he cannot be questioned out of the presence of his attorney absent a waiver by the accused in the presence of his attorney. According to the Court of Special Appeals, the right to counsel belongs to the accused and not to his counsel. The court recognized that the critical inquiry is whether the accused waived that right and that, absent coercion or trickery, which would negate complete voluntariness, a volunteered statement given in the absence of counsel is admissible. Concluding that Watson had chosen to ignore the advice of his attorney, the Court of Special Appeals upheld the trial court's finding that Watson's statement was voluntarily made after an intelligent waiver of his right to counsel. *Id.* at 388, 370 A.2d at 1152.

9. 430 U.S. 387 (1977).

10. The Court of Appeals granted the writ of certiorari expressly to consider the effectiveness of the waiver in light of *Brewer*. 282 Md. at 74, 382 A.2d at 575.

this contention and affirmed Watson's conviction.[11] Judge Eldridge wrote a dissenting opinion that was joined by Judges Digges and Levine.[12]

The *Watson* majority extensively summarized and quoted from the *Brewer* decision, in which the defendant, Williams, on the advice of his attorney had surrendered to the police in Davenport, Iowa two days after an arrest warrant had been issued charging that he had abducted a ten-year-old girl in Des Moines. The defendant, who had been arraigned and was to be transported to Des Moines, had retained counsel in both Davenport and Des Moines. The police had agreed with Williams' attorneys that no questions would be asked during the trip from Davenport to Des Moines, and although the police did not directly question Williams during the trip, Detective Leaming delivered a lengthy "speech"[13] that was later admitted to have been intended to obtain incriminating information.[14] Williams thereafter made several inculpatory statements and directed the police to the girl's body.[15] The Supreme Court concluded that Leaming's speech was equivalent to an interrogation and that Williams had therefore been denied his right to legal representation.[16] The Court then addressed whether Williams had waived his right to counsel and concluded that "Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right."[17] Therefore, it held that "[t]he Court of Appeals [for the Eighth Circuit] did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not."[18]

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11. *Id.* at 84, 382 A.2d at 580.

12. *Id.*

13. Brewer v. Williams, 430 U.S. 387, 392-93 (1977). Detective Leaming delivered what has become known as the "Christian burial speech" to the defendant, a former mental patient with deeply religious convictions.

> "I want to give you something to think about while we're traveling down the road . . . . Number one, I want you to observe the weather conditions . . . . They are predicting . . . snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl . . . ."

Id.

14. *Id.* at 399 & n.6.

15. *See id.* at 393.

16. *See id.* at 401; notes 24 to 28 & 41 to 49 and accompanying text *infra.*

17. 430 U.S. at 404.

18. *Id.* at 405-06 (footnote omitted) (emphasis in original). In rather blistering dissents, Chief Justice Burger, *id.* at 415-17 & n.1, Mr. Justice White, *id.* at 430, and Mr. Justice Blackmun, *id.* at 441, argued that the police had not engaged in any unconstitutional conduct and that, because Williams' statements and any testimony that he had led the police to the girl's body would have to be excluded at a future trial, any attempt to retry the defendant would be futile. According to Chief Justice Burger,

The *Watson* majority interpreted these statements as establishing that the Supreme Court clearly did not hold that an individual may not waive his right to counsel once he has obtained an attorney.[19] It concluded that the appropriate standard was, as stated in Justice Powell's concurrence in *Brewer,* that a statement would be admissible if it was found that the defendant "did indeed waive the right to assistance of counsel and then 'freely on his own initiative . . . confessed the crime . . . .'"[20] In applying this standard, the Maryland Court of Appeals distinguished the *Watson* facts from those in *Brewer*:

> The polygraph test here was no trick or coercive tactic; Watson willingly submitted to it. It was after this that he took matters in his own hands. There is nothing in the record before us to indicate that Watson is in any way other than a normal individual mentally. We have here no psychological coercion as in *Brewer*.[21]

The majority concluded that the facts "clearly add[ed] up to a knowing, intelligent, effective waiver of counsel . . . ."[22]

Because no single fact in the *Watson* record provides strong and compelling evidence that Watson did or did not waive his right to counsel, it is difficult to evaluate the court's determination that Watson actually had waived his right to counsel. The analysis employed by the *Watson* majority to reach its result, however, is disturbing. The majority failed to discuss whether Watson actually had a right to counsel in these circumstances. Most fundamentally, however, assuming that Watson's right to counsel had attached, the majority opinion failed to demonstrate an appreciation of *Brewer*'s constitutional standards for determining whether a waiver had occurred or the rigorous application of those standards reflected by that decision.

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the public would be punished for the mistakes of its law enforcement officers. *Id.* at 416.

Mr. Justice Stewart, writing for the Court, disagreed, arguing that evidence of where and how the body was found and its condition might be admissible on the theory that the body would have been discovered even if the incriminating statements had not been elicited from the defendant. *Id.* at 406 n.12. On retrial, the defendant sought to exclude evidence of the discovery of the girl's body and the fact of her death. The trial judge, overruling the defendant's motion to suppress this evidence, held that the state had proved by a preponderance of the evidence that the body would have been discovered "'in any event,'" and Williams was convicted. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 193 (4th ed. Supp. 1979) (excerpt from trial court's ruling on motion to suppress evidence of the discovery of victim's body).

19. 282 Md. at 82, 382 A.2d at 579.

20. *Id.* (quoting Brewer v. Williams, 430 U.S. 387, 405-06 (1977) (Powell, J., concurring)).

21. 282 Md. at 84, 382 A.2d at 580.

22. *Id.*

Under the sixth amendment to the United States Constitution as applied to the states through the fourteenth amendment,[23] the accused in a criminal prosecution is guaranteed the right to the assistance of counsel.[24] Originally applicable only to the trial itself, the right to the assistance of counsel has been extended to pretrial proceedings in which a denial of representation would adversely affect the fairness of the trial.[25] The Supreme Court has stated that the right to counsel attaches upon "the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment. information, or arraignment."[26] Once the right to counsel has attached, an individual is entitled to the assistance of counsel at every critical stage of the pretrial proceedings,[27] and a police interrogation of the accused after the initiation of adversary judicial proceedings is one of several situations that are considered critical.[28] Strictly speaking, it was not essential that the *Watson* court expressly consider whether the defendant's sixth amendment right to counsel had attached when he made his incriminating statement. Watson had participated in two preliminary hearings before making the statement to Detective Hopkins,[29] and it is clear that this initiation of adversary proceedings triggered his right to counsel.[30] He was therefore entitled to the assistance of

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23. The sixth amendment right to the assistance of counsel has been applied to state prosecutions by incorporation into the due process clause of the fourteenth amendment. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel applies to all state prosecutions if offense is punishable by imprisonment); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel extended to the states by fourteenth amendment; applies to all felony prosecutions); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel in state trial for capital offense is guaranteed by fourteenth amendment due process clause).

24. U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Of course, the protections afforded by the sixth amendment also apply in federal prosecutions. *See* Von Moltke v. Gillies, 332 U.S. 708 (1948); Johnson v. Zerbst, 304 U.S. 458 (1938).

25. *See* United States v. Ash, 413 U.S. 300, 309-13 (1973); Schneckloth v. Bustamonte, 412 U.S. 218, 238-39 (1973); United States v. Wade, 388 U.S. 218, 224-27 (1967).

26. Kirby v. Illinois, 406 U.S. 682, 689 (1972).

27. *See* Coleman v. Alabama, 399 U.S. 1, 7-10 (1970) (preliminary hearing); United States v. Wade, 388 U.S. 218, 236-37 (1967) (post-indictment lineup identification); White v. Maryland, 373 U.S. 59 (1963) (per curiam) (preliminary hearing in which defendant enters plea); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment); *cf.* Kirby v. Illinois, 406 U.S. 682 (1977) (because identification at police station was pre-indictment, adversary judicial proceedings had not been initiated against the accused and did not require presence of counsel).

28. Brewer v. Williams, 430 U.S. 387, 401 (1977); Massiah v. United States, 377 U.S. 201, 205-06 (1964).

29. 282 Md. at 75, 382 A.2d at 576.

30. *See, e.g.*, Kochel v. State, 10 Md. App. 11, 16, 267 A.2d 755, 758 (1970) (Maryland's preliminary hearing is a critical stage); note 26 and accompanying text *supra*.

an attorney whenever a law enforcement official interrogated him. The *Watson* majority, however, failed to inquire whether Watson's statement was the product of an interrogation, and, because under *Brewer* an interrogation is a prerequisite to the accused's right to the presence of his attorney,[31] this failure to determine whether Watson was in fact "interrogated" was a serious omission.

In *Miranda v. Arizona*,[32] the Supreme Court defined custodial interrogation as *questioning* initiated by law enforcement officials after an individual has been taken into custody or otherwise significantly deprived of his freedom of action.[33] Under *Miranda*, an individual has a "limited Fifth Amendment right to counsel"[34] whenever he is subjected to a custodial interrogation to protect against compelled self-incrimination.[35] Previously, however, in *Massiah v. United States*,[36] the Court had employed a significantly different meaning of interrogation with respect to the sixth amendment right to counsel. Massiah retained counsel after indictment on federal narcotics charges. Later, he made incriminating statements to his co-defendant, who was secretly cooperating with federal narcotics agents. The co-defendant had permitted the agents to install a transmitting device under the seat of the car in which the statements were made so that an agent could overhear the conversation with Massiah. At the defendant's trial, the agent was permitted to testify as to the content of these statements.[37] The Supreme Court held that the defendant was denied the protection afforded by the sixth amendment right to counsel "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel,"[38] and that the defendant's statements "obtained under the circumstances here disclosed, could not

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31. *See* text accompanying note 49 *infra*.

32. 384 U.S. 436 (1966).

33. *See id.* at 444.

34. *Id.* at 537 (White, J., dissenting).

35. *See id.* at 468-72.

36. 377 U.S. 201 (1964). There are several differences between the right to counsel under *Miranda* and *Massiah*. The right to counsel under *Massiah* is a sixth amendment right which only attaches upon the initiation of adversary judicial proceedings. *Id.* at 204-05. Because the *Miranda* fifth amendment right to counsel applies whenever the accused is subjected to a custodial interrogation, it will have a broader application, encompassing a greater number and variety of situations, prior to the initiation of adversary judicial proceedings. After the initiation of adversary proceedings, however, because the *Massiah* sixth amendment right does not require the accused to be in custody or subjected to an actual interrogation, *see* text accompanying notes 37 to 40 *infra*, the *Massiah* right will have a broader application. *See* United States v. Brown, 569 F.2d 236, 240 (5th Cir. 1978) (Simpson, J., dissenting).

37. 377 U.S. at 202-03. Because Massiah was not in custody and was not actually questioned, the agent's conduct would not have qualified as an interrogation under *Miranda*. *See* Beckwith v. United States, 425 U.S. 341, 347 (1976).

38. 377 U.S. at 206.

constitutionally be used by the prosecution as evidence against *him* at his trial."[39] It seems apparent, therefore, that the *Massiah* Court did not consider an interrogation for sixth amendment purposes to be limited to *questioning* by the law enforcement officials. Rather, the Court considered the agent's *deliberate elicitation* of incriminating evidence to be an interrogation and hence a critical stage at which the accused was entitled to the assistance of an attorney.[40]

The *Brewer* Court reaffirmed *Massiah,* stating that "the clear rule of *Massiah* is that once adversary judicial proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[41] Because Williams' arraignment was the commencement of adversary judicial proceedings, it was clear that his sixth amendment right to counsel had attached. Moreover, because Detective Leaming had "deliberately and designedly set out to elicit information from Williams just as surely as — and perhaps more effectively than — if he had formally interrogated him,"[42] the "Christian burial speech" was tantamount to an interrogation.[43] Furthermore, the Court emphasized that the fact "[t]hat the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise [in *Brewer*], is constitutionally irrelevant."[44] The *Brewer* Court concluded that the circumstances of the case before it were "constitutionally indistinguishable from those presented in *Massiah*" and that it required "no wooden or technical application of the *Massiah* doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments."[45] The *Brewer* Court's finding that the "speech" was tantamount to an interrogation, even though Detective Leaming's "Christian burial speech" was a declarative statement[46] and was followed sometime thereafter by an admonition to the defendant not to respond but just to think about it,[47] emphasizes clearly that the appropriate definition of interrogation for sixth amendment purposes is the *Massiah* concept of the deliberate elicitation of incriminating information.[48]

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39. *Id.* at 207 (emphasis in original).

40. *See id.* at 206 (quoting United States v. Massiah, 307 F.2d 62, 72 (2d Cir. 1962) (Hays, J., dissenting) (" 'if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse.' ")).

41. Brewer v. Williams, 430 U.S. at 401 (footnote omitted).

42. *Id.* at 399.

43. *See id.* at 400.

44. *Id.*

45. *Id.* at 400, 401.

46. *See* note 13 *supra.*

47. 430 U.S. at 393.

48. Prior to *Brewer,* there had been some confusion among the courts over whether surreptitious police activity was essential before the *Massiah* rule could be invoked. The confusion resulted from several Supreme Court per curiam opinions that had simply reversed lower court decisions by citing *Massiah.* For a discussion of the confusion, see State v. Blizzard, 278 Md. 556, 562-73, 366 A.2d 1026, 1029-35 (1976). The Supreme Court cases generating the confusion were Beatty v. United States, 389

The failure of the *Watson* majority to consider whether Watson had been interrogated is especially disturbing in view of the *Brewer* Court's clear statement that no right to the assistance of counsel "would have come into play if there had been no interrogation."[49] Although the court did attempt to distinguish *Brewer* and *Massiah* from the case before it on the ground that no psychologically coercive or surreptitious police activity had taken place in *Watson*,[50] its opinion is unclear as to whether the drawing of this distinction was intended to establish that Watson had not been interrogated or that his waiver of his right to counsel had been voluntary. It is clear, however, that the majority erred if it was attempting to state that the absence of coercive or surreptitious police activity precluded a finding that an interrogation had taken place. The *Brewer* Court's statement that the absence in *Brewer* of the surreptitious activity present in *Massiah* was constitutionally irrelevant to its decision[51] strongly suggests that the absence in *Watson* of the type of coercion present in *Brewer* should also be constitutionally irrelevant.[52] As was made clear by *Brewer* and *Massiah*, the crucial inquiry regarding interrogation was whether Watson's incriminating statements had been deliberately elicited by Hopkins. Although coercive or surreptitious activity may be viewed as evidence of deliberate elicitation, the presence or absence of such activity is not conclusive. Both *Brewer* and *Massiah* indicate that the intent of the law enforcement officials is the controlling factor.[53] Further, it has in fact been held that *Massiah* protects against only those deliberate efforts of law enforcement agents that are intended specifically to elicit incriminating statements relative to the indicted offense.[54]

Affirmative police conduct that encourages an accused to make a statement should be recognized as the best indication of an intent to elicit incriminating evidence.[55] The record in *Watson* does not contain any facts that compellingly indicate that Detective Hopkins intended to elicit

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U.S. 45 (1967) (per curiam); McLeod v. Ohio, 381 U.S. 356 (1964) (per curiam); McLeod v. Ohio, 378 U.S. 582 (1964) (per curiam). *See also* Miller v. California, 392 U.S. 616 (1968) (per curiam) (writ of certiorari dismissed as improvidently granted). For an excellent analysis of the interrogation issue after *Brewer*, see Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1 (1978).

49. 430 U.S. at 400.

50. 282 Md. 73, 382 A.2d 574.

51. *See* text accompanying note 44 *supra*.

52. *See id.*

53. *See* notes 38 to 40, 42 & 43 and accompanying text *supra*; note 55 *infra*.

54. United States v. Garcia, 377 F.2d 321, 324 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967).

55. For example, in *Massiah*, the police admitted that they had installed the transmitter in the co-defendant's car in the hope of obtaining incriminating evidence from the defendant, 377 U.S. at 206, and in *Brewer*, Detective Leaming admitted that the "Christian burial speech" was designed to coerce the defendant into revealing the location of the victim's body, 430 U.S. at 399 & n.6. Even without these admissions,

incriminating evidence from Watson. Watson asked to see Hopkins after he had failed the polygraph examination. Upon his arrival, Hopkins told the defendant that he had twice unsuccessfully attempted to reach his attorney and said: "I understand you have something you want to tell me, but, first of all, I'm going to read your rights again."[56] These words, in addition to the reading of the *Miranda* rights, are the only facts in the record from which Hopkins' intent can be gleaned.[57] By telling Watson about the calls to his attorney and reading him his rights, however, Hopkins reminded the defendant of two important facts: Watson had an attorney and he had a right to have that attorney present. This reminder would appear to have discouraged Watson from making an incriminating statement, and although Hopkins undoubtedly was trying to protect the admissibility of any subsequent statements, his words do not seem to have been designed to encourage or motivate Watson to give an incriminating statement. Finally, although *Brewer* demonstrates that a declarative statement could be considered an interrogation, Hopkins' declarative statement seems entirely neutral when compared with the "Christian burial speech"[58] delivered by the officer in *Brewer*. Hopkins' willingness to accept a statement, which was evidenced by his largely neutral and passive conduct, does not evince a deliberate intent to elicit incriminating evidence.[59]

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however, the factual patterns in both cases made the police official's intent fairly obvious. *See* Henry v. United States, 590 F.2d 544, 549 (4th Cir. 1978) (Russell, J., dissenting).

56. 282 Md. at 76, 382 A.2d at 576.

57. For a discussion of the inadequacy of the record in this case, see note 100 *infra*.

58. *Compare* note 13 *supra with* notes 3 to 6 and accompanying text *supra*.

59. *See* Wilson v. Henderson, 584 F.2d 1185, 1191 (2d Cir. 1978) (no interrogation under *Brewer* or *Massiah* because cellmate, who was cooperating with police, obtained incriminating evidence, did not question the defendant, and had been told to listen only for evidence concerning defendant's accomplices); United States v. Hearst, 563 F.2d 1331, 1347-48 (9th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 1000 (1978) (government monitoring and recordation of incriminating statements made to jailhouse visitor, unaware of monitoring and not cooperating with government, did not amount to an interrogation under *Massiah*). *But see* Henry v. United States, 590 F.2d 544, 547 (4th Cir. 1978) (incriminating information obtained by cellmate-informant was an interrogation under *Massiah* even though informant did not ask any questions).

In *Watson*, Judge Eldridge stated in dissent that neither the majority nor the state disputed that an interrogation had taken place and consequently, the interrogation was express. 282 Md. at 85 & n.1, 382 A.2d at 581 & n.1. Although Judge Eldridge offered no explanation for his conclusion, it appears that an interrogation could have been found.

A strong case for interrogation could be made if it appeared that Hopkins had suggested that Watson take the polygraph examination with the hope that Watson would fail the test and could then be pressured into making an incriminating statement. *Cf.* Johnson v. State, 31 Md. App. 303, 305, 355 A.2d 504, 506 (1976)

Watson's statement could also be deemed outside the protection afforded by the sixth amendment under an alternative analysis. Several courts have concluded that a "volunteered" incriminating statement by an accused does not implicate a sixth, or even the "limited fifth," amendment right to the assistance of counsel and is admissible.[60] A "volunteered" statement is a statement that the accused spontaneously and voluntarily "blurts" out.[61] In practical effect, a finding that a statement is "volunteered" is tantamount to a finding that a statement was not the product of a solicitation or interrogation by law enforcement officials within the meaning of either *Massiah* or *Miranda,* and absent an interrogation, of course, no right to counsel would exist.[62] In *State v. Blizzard,*[63] the Maryland Court of Appeals apparently approved of the "volunteered" statement rule. In

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(polygraph used as psychological tool to induce accused to confess). No evidence in the record, however, supported this conclusion.

It might be argued that an intent to elicit incriminating information is inferrable from Hopkins' statement to Watson. *See* note 56 and accompanying text *supra.* Hopkins knew that Watson had failed the polygraph test and probably would be upset or distraught. Further, he knew that Watson had requested to see him and wanted to talk to him. From this, Hopkins, who knew that Watson was represented by an attorney, might have anticipated that Watson would make a statement. Thus, Hopkins might have formed an intent to obtain information. Moreover, upon entering the room, Hopkins said to Watson, "I understand you have something you want to tell me," and this statement could possibly be found to have been intended to prompt a response from Watson. Although Hopkins also read Watson his *Miranda* rights and informed him that attempts to reach his attorney had been unsuccessful, these acts could have been designed merely to safeguard the admissibility of any subsequent statement, and are not necessarily inconsistent with an intent to elicit incriminating information. Moreover, the fact that he read the *Miranda* rights possibly suggests an intent to interrogate. Thus, even though Hopkins knew that Watson was represented by counsel and that an agreement not to question Watson had been reached, and although Hopkins read Watson his rights, his statement to Watson could be interpreted as reflecting an intent to elicit a response, which might be considered tantamount to an interrogation. This conclusion would, in fact, be consistent with the *Brewer* Court's conclusion that the "Christian burial speech," though declarative and not actually requesting a response, was tantamount to an interrogation.

60. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 478 (1966) (dictum) ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence . . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."); United States v. Gaynor, 472 F.2d 899, 899 (2d Cir. 1973) (no violation of *Miranda* rule when incriminating statement was volunteered and not the product of an official interrogation); United States v. Maxwell, 383 F.2d 437, 443 (2d Cir. 1967), *cert. denied,* 389 U.S. 1057 (1968) (freely volunteered statement does not violate *Massiah*); United States v. Garcia, 377 F.2d 321, 324 (2d Cir.), *cert. denied,* 389 U.S. 991 (1967) (*Massiah* rule does not apply to spontaneous or voluntary statements made in presence of government agents); People v. Hobson, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976).

61. *See* note 60 *supra.*

62. *See* note 49 and accompanying text *supra.*

63. 278 Md. 556, 366 A.2d 1026 (1976).

Blizzard, an incarcerated defendant summoned a police officer to his cell. Upon arrival, the officer informed the defendant that the police had him "up tight" in regard to a certain armed robbery. The defendant's response that he "knew it" was used at trial to secure a conviction.[64] On appeal, the Court of Appeals implicitly approved the proposition that in the absence of police coercion or trickery, which would of themselves negate complete voluntariness, a "volunteered" statement given in the absence of counsel is admissible.[65] The court stated that the police officer's statement was not a violation of the defendant's right to counsel, apparently because the statement did not amount to an interrogation, and no coercion, trickery, or cajolery was involved.[66] In effect, the court concluded that the statement was volunteered. Similarly, because Watson's statement could have been considered spontaneous, and was in fact found to have been voluntary, it is unclear why the *Watson* majority failed to discuss the possibility that the statement had been "volunteered." The majority did conclude that there was an absence of police coercion or trickery,[67] and it could have argued persuasively that Hopkins' statement was essentially neutral and not intended to be an interrogation.[68] Under this approach, therefore, Watson's statement, could have been deemed a spontaneous, "volunteered" statement that did not result from any prompting or interrogation by Hopkins.

In summary, the court did not determine whether Watson's statement was either the product of an interrogation or a volunteered statement. It did state, however, that Watson's statement would be admissible only if he had effectively waived his right to counsel, and then freely and on his own initiative made the inculpatory statement.[69] In analyzing the sixth amendment issue in this manner, the court apparently failed to realize that no right to the presence of counsel would have existed unless an interrogation had taken place, and if there were no such right to counsel, determining whether Watson had waived his sixth amendment right would not have been necessary.[70] It cannot, of course, be determined from the

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64. *Id.* at 560, 366 A.2d at 1028.

65. *Id.* at 573, 366 A.2d at 1035; *see* Watson v. State, 35 Md. App. 381, 388, 370 A.2d 1149, 1152 (1977), *aff'd,* 282 Md. 73, 382 A.2d 574 (1978).

66. 278 Md. at 574-75, 366 A.2d at 1036-37 (alternative holding). The ambiguity of the *Blizzard* majority opinion makes it difficult to determine the court's actual holding. Although the court seemed to hold that the defendant's voluntary statement was not inadmissible because it was not a product of any trickery, cajolery, or interrogation, it also appeared to hold that the defendant's statement fell far short of being incriminating. *See id.* If the statement was not incriminating, however, there would be no reason to address the voluntariness or interrogation issues. The *Blizzard* opinion nevertheless has been interpreted to stand for the proposition stated in the text accompanying note 65 *supra. See* Watson v. State, 35 Md. App. 381, 388, 370 A.2d 1149, 1152 (1977), *aff'd,* 282 Md. 73, 382 A.2d 574 (1978).

67. 282 Md. at 84, 382 A.2d at 580.

68. *See* text accompanying note 59 *supra.*

69. 282 Md. at 82, 382 A.2d at 579.

70. *See* note 49 and accompanying text *supra.*

court's opinion whether the failure to address the interrogation issue resulted from a failure to appreciate the import of the controlling constitutional doctrines or simply from an unstated decision to assume an interrogation in order to reach the waiver issue. In any event, the majority simply did not address a potentially narrower ground upon which to base its decision. Moreover, by neglecting the interrogation issue in a case in which, at least plausibly, an interrogation had not occurred, the majority implicitly adopted a broad position concerning the scope of the sixth amendment right to counsel — its opinion can be interpreted as a declaration that once adversary judicial proceedings have been initiated against an accused, no incriminating statements will be admissible, irrespective of whether there was an interrogation, unless the accused has effectively waived his right to counsel.[71] Because both *Brewer* and *Massiah* required an interrogation before the accused would be entitled to the right to counsel,[72] neither decision advocated such a broad application of the sixth amendment right to counsel.

Although the majority may be faulted for failing to analyze whether Watson was entitled to the assistance of counsel, a more glaring error is apparent in its method of analyzing the waiver issue. Initially, the court examined whether the presence of a defendant's attorney is essential to an effective waiver of counsel.[73] *Massiah* did not reach this issue, and cases decided after *Massiah* have developed two different rules concerning the admissibility of statements obtained from a defendant after his right to counsel has attached. A minority of courts have adopted the "per se" rule, holding that all statements obtained from an accused by police interview in the absence of his attorney are inadmissible.[74] Although the "per se" rule does not expressly address waiver issues, it suggests that a waiver may be effective only if it is made in the presence of the defendant's attorney[75] or after the attorney is given notice of the interrogation and a reasonable

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71. The net effect of this position is to undermine and contradict the position apparently adopted by the Court of Appeals in *Blizzard*, *see* notes 63 to 66 and accompanying text *supra*, that "volunteered" statements are admissible. The clear premise of this position is that "volunteered" statements, *i.e.*, those that are not the product of an interrogation, do not entitle the accused to the assistance of counsel. Therefore, no reason exists to inquire whether the accused waived that right. By in effect holding that to be admissible a statement must follow an effective waiver of the right to counsel, however, the *Watson* majority apparently declared that even "volunteered" statements must be accompanied by an effective waiver.

72. *See* notes 40 & 49 and accompanying text *supra*.

73. 282 Md. at 78, 382 A.2d at 577.

74. *See* United States *ex rel.* O'Connor v. New Jersey, 405 F.2d 632 (3d Cir.), *cert. denied*, 395 U.S. 923 (1969); Hancock v. White, 378 F.2d 479 (1st Cir. 1967); State v. Green, 46 N.J. 192, 215 A.2d 546 (1965), *cert. denied*, 384 U.S. 946 (1966); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

75. *See* People v. Hobson, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976) (defendant cannot waive his right to counsel unless his attorney is actually present).

opportunity to be present.[76] The majority rule, which has been adopted in Maryland,[77] holds that an attorney's absence at the time an incriminating statement is made does not in itself render the statement automatically inadmissible.[78] *Watson* reaffirmed Maryland's adherence to the majority rule and supported its reaffirmance by pointing to the *Brewer* Court's emphasis that it was not holding that Williams could not waive his right in the absence of counsel.[79] By negative inference, therefore, *Brewer* supports the majority rule adhered to by *Watson*.

Having concluded that the presence of counsel is not essential to an effective waiver, the *Watson* majority examined the question whether Watson had waived his right to counsel, adopting the standard suggested in Justice Powell's concurring opinion in *Brewer*: a statement will be admissible if the defendant knowingly and intelligently waived his right to counsel and then freely and on his own initiative made the statement.[80] The court stated simply that Watson was not subjected to psychological coercion or surreptitious activity as were the defendants in *Brewer* and *Massiah*. The polygraph was not a trick or coercive tactic and Watson simply took matters into his own hands.[81] These facts, in the court's view, clearly added up to an effective waiver of counsel.[82]

Because the majority's opinion is ambiguous, determining which aspects of the waiver issue the majority was attempting to address is difficult. Its analysis appears to focus on the voluntariness of Watson's statement, as if it were examining a fifth amendment, compelled self-incrimination issue, rather than the question whether Watson waived his sixth amendment right to counsel. This approach fails to reflect fully the waiver standards enunciated in *Brewer*.[83] As Judge Eldridge correctly pointed out in dissent: "The majority makes no serious attempt to view the facts of this case in light of these [*Brewer*'s] long established standards. It rests content with the statements, 'he took matters in his own hands [and

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76. *See* United States v. Thomas, 474 F.2d 110 (10th Cir.), *cert. denied,* 412 U.S. 932 (1973).

77. *See* State v. Blizzard, 278 Md. 556, 574-75, 366 A.2d 1026, 1036 (1976).

78. *See* Moore v. Wolff, 495 F.2d 35, 36-37 (8th Cir. 1974); United States v. Gaynor, 472 F.2d 899, 900 (2d Cir. 1973); United States v. Tucker, 435 F.2d 1017, 1018 (9th Cir. 1970); United States v. DeLoy, 421 F.2d 900, 902 (5th Cir. 1970); Arrington v. Maxwell, 409 F.2d 849, 853 (6th Cir. 1969).

79. Brewer v. Williams, 430 U.S. 387, 405-06 (1977).

80. 282 Md. at 82, 382 A.2d at 579. The term "knowing and intelligent" has been used interchangeably with the "intentional relinquishment or abandonment standard" adopted in *Brewer* as the standard for waiver. *See* Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). The waiver standards in *Brewer,* however, encompass more than a mere litany that a waiver must be an intentional relinquishment or abandonment of a known right or privilege. *See* notes 85 to 89 and accompanying text *infra*.

81. *See* note 21 and accompanying text *supra*.

82. *See* note 22 and accompanying text *supra*.

83. *See* notes 85 to 89 and accompanying text *infra*.

appears to be] a normal individual mentally.' This is insufficient."[84] This failure to provide any reasoning other than that alluded to by Judge Eldridge totally ignores the thrust of the *Brewer* decision.

Brewer defined waiver as the "intentional relinquishment or abandonment of a known right or privilege."[85] According to *Brewer,* in determining whether an accused has effectively waived his sixth amendment right to the assistance of an attorney, courts should indulge every reasonable presumption against waiver. Thus, the state is deemed to have a heavy burden of proof that a waiver occurred.[86] A waiver cannot be found simply because a statement is eventually made[87] or the defendant fails to assert his rights.[88] The ultimate determination of whether an effective waiver has been made depends upon an application of the above standards to the particular facts and circumstances surrounding each case as independently evaluated by the reviewing court.[89]

The *Brewer* Court's application of these standards demonstrates that the standards are to be applied strictly and rigorously. Although Williams had been informed of and appeared to understand his right to counsel, the Court stressed that "waiver requires not merely comprehension but relinquishment, and Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right."[90] Williams had sought the advice of counsel before surrendering to the police, after his booking and arraignment, and in the discussions he had with Detective Leaming prior to embarking on the trip to Des Moines.[91] While in the car, he told the police that he would tell the entire story after seeing his attorney in Des Moines. The *Brewer* Court interpreted this as a clear expression that Williams desired the presence of his attorney prior to any interrogation.[92] Finally, the Court noted that even before he made the incriminating statement,

> Williams had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, acting as his agents, had made clear to the police that no interrogation was to occur during the journey. Williams knew of that agreement and, particularly in view of his consistent reliance on counsel, there is no basis for concluding that he disavowed it.[93]

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84. 282 Md. at 87-88, 382 A.2d at 582 (Eldridge, J., dissenting).
85. 430 U.S. at 404 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
86. 430 U.S. at 404.
87. United States v. Blair, 470 F.2d 331 (5th Cir. 1972), *cert. denied,* 411 U.S. 908 (1973).
88. Carnley v. Cochran, 369 U.S. 506, 513 (1962).
89. *See* 430 U.S. at 403-05.
90. *Id.* at 404.
91. *See id.*
92. *See id.* at 405.
93. *Id.* (footnote omitted).

The analysis of the *Watson* majority discloses no real attempt to examine the facts according to the standards and rigorous analysis reflected in *Brewer*. The court attempted to distinguish *Watson* from *Brewer* and *Massiah* by noting the absence of psychological coercion or surreptitious activity in *Watson*[94] and decided the case by comparing the *Watson* facts to *Brewer*, rather than by applying the *Brewer* standards to the *Watson* facts. Yet, as Judge Eldridge correctly stated, the existence of coercion or surreptitious activity in *Brewer* and *Massiah* was relevant only to determining whether there had been an interrogation and was not addressed to the waiver issue.[95] In essence the *Watson* majority simply appropriated Justice Powell's statement that an inculpatory statement is admissible if it is found that a waiver occurred and that the statement was freely made. Because coercion was absent, Watson's statement was apparently found to be freely made. Without further explaining its reasoning, the majority concluded that the facts added up to a waiver. Its apparent reasoning was that the lack of coercion, plus the fact that Watson made a statement, indicated that Watson had waived his right to counsel.[96] The majority did not, however, analyze the first prong of its own standard to determine if Watson had waived his right. Its conclusory statement that Watson took matters into his own hands plainly overlooks the *Brewer* Court's statement that proof of an intentional relinquishment of the right is essential to a finding of waiver.[97] In fact, the crucial finding of *Brewer* was that Williams had not relinquished his right to counsel.[98] In failing to recognize the rigorous application of the controlling standards to the facts mandated by *Brewer*,[99] or that the burden is on the state to prove that a waiver occurred and that a waiver cannot be presumed,[100] the majority in effect placed the burden on the defendant to prove that he did not waive his right to counsel.

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94. *See* 282 Md. at 83–84, 382 A.2d at 580.

95. *See id.* at 85–86 n.1, 382 A.2d at 581 n.1 (Eldridge, J., dissenting).

96. This reasoning implies that any uncoerced statement is automatically deemed a waiver of the right to counsel.

97. *See* text accompanying note 85 *supra*.

98. *See* text accompanying note 90 *supra*.

99. The strict standards of waiver set forth in *Brewer* can be effective only if they are conscientiously applied to the facts of each case. A meaningful waiver standard cannot be developed unless the courts applying it elaborate their reasoning and describe the facts relied upon in finding effective waivers. In *Watson*, the Court of Appeals failed to engage in this process. As a result, the court has implicitly recognized that the *Brewer* standards exist, but it has greatly reduced their potential impact by demonstrating that Maryland courts will not be required to apply them in any meaningful sense.

100. *See* notes 86 & 87 and accompanying text *supra*. The state satisfied its heavy burden of proof by producing a single witness, Detective Hopkins, who testified very little about the circumstances surrounding Watson's statement. The polygraph operator was not called to verify any of Detective Hopkins' testimony, and it has been suggested that this kind of failure may preclude the state from meeting its heavy burden of proof. *See, e.g.*, Mercer v. State, 237 Md. 479, 484, 206 A.2d 797, 800–01 (1965) (state's burden to show that a confession was voluntary not met when two of

If the Court of Appeals had applied the *Brewer* standards to the facts found by the trial court, it might nevertheless have been led to conclude that Watson had waived his right to counsel. Although *Brewer* and *Watson* are factually similar in many respects,[101] several important factual differences suggest that Watson may have effectively waived his right to counsel. Unlike Williams, Watson did not expressly or implicitly assert his right to counsel[102] and did not rely consistently on the advice of his attorney[103] until the time that he made an incriminating statement. Watson initiated the meeting that led to his statement; he was informed by Detective Hopkins of the attempts to reach his attorney and was reminded for the third time that he had a right to have an attorney present. Although Watson's attorney had advised him not to make any statements beyond the polygraph test, the defendant responded by saying that he understood his rights, that he wanted to talk to Hopkins, and that he wanted to get something off his

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three officers present at interrogation did not testify). In addition, Hopkins failed to comply with standard police practice by not obtaining Watson's signature on a waiver-of-rights form. Although Hopkins was never asked whether he attempted to obtain a signed waiver, a refusal to sign a waiver has been held to be evidence of a defendant's desire to invoke his right to counsel. *See* United States v. Jenkins, 440 F.2d 574, 576 (7th Cir. 1971). The record in *Watson* is surprisingly vague about the events that occurred before and during Watson's inculpatory statement and contrasts sharply with the extensive record normally compiled by Maryland courts inquiring into a defendant's waiver of his *Miranda* rights. *See generally* Trovinger v. State, 34 Md. App. 357, 367 A.2d 548 (1977); Sabatini v. State, 14 Md. App. 431, 287 A.2d 511 (1972); Anderson v. State, 6 Md. App. 688, 253 A.2d 387 (1969); Fowler v. State, 6 Md. App. 651, 253 A.2d 409 (1969); Mullaney v. State, 5 Md. App. 248, 246 A.2d 291 (1968); Robinson v. State, 3 Md. App. 666, 240 A.2d 638 (1968).

101. In *Brewer,* the defendant, Williams, had retained counsel and had been advised by counsel to turn himself in. 430 U.S. at 390. Watson had also retained counsel and had been advised by his attorney to take the polygraph test. 282 Md. at 75, 382 A.2d at 576. Williams was aware of the agreement between his attorneys and the police that he would not be questioned during the ride to Des Moines. 430 U.S. at 404-05. Similarly, Watson was aware that Hopkins had agreed that no questions, other than those involved in the polygraph, would be asked. 282 Md. at 75, 382 A.2d at 576. Williams consistently relied on the advice of his attorneys until the time he revealed incriminating evidence to the police. 430 U.S. at 404-05. Watson consistently relied on the advice of his attorney until after he had taken the polygraph test. 282 Md. at 76, 382 A.2d at 576.

102. During the trip to Des Moines, Williams told the police that he would tell them the "whole story" after he had seen his attorney. 430 U.S. at 405. The *Brewer* court viewed this as an express assertion of his right to counsel, *id.*, but Watson did not make any similar assertion.

103. No evidence in *Brewer* suggests that the defendant ignored the advice of his attorneys other than the fact that he revealed incriminating evidence. Watson, on the other hand, relied on the advice of his attorney only until the polygraph test had been completed. He then asked to see Hopkins and told him that he wanted to make a statement, something that his attorney had expressly told him not to do. 282 Md. at 76, 382 A.2d at 576. These statements provide additional, independent evidence that Watson did not consistently rely on the advice of his attorney. Similar evidence was apparently not present in *Brewer.*

chest.[104] These statements, which immediately followed Hopkins' warning that the defendant was entitled to have his attorney present, demonstrate that Watson's right to counsel was a known right or privilege and could certainly be viewed as affirmative evidence of Watson's desire to relinquish his right. This conclusion is undermined to some extent by the fact that Hopkins made no attempt to determine if Watson wanted to waive his right to counsel.[105] In addition, the state's evidence was arguably insufficient to carry its heavy burden of proof.[106]

In contrast to the majority, Judge Eldridge in dissent did apply the *Brewer* standards. First, he observed that Watson's incriminating statements were made in the aftermath of the polygraph examination, an event that almost certainly had an unsettling effect on the defendant, especially after he was informed that he had failed. Even if the statements could be said to have been voluntary for purposes of the self-incrimination clause of the fifth amendment, they should not, according to Judge Eldridge, be deemed voluntary with respect to the higher waiver standards for the sixth amendment.[107] Second, Judge Eldridge noted that Hopkins had told Watson

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104. *Id.* at 76, 382 A.2d at 576. *See also* Miranda v. Arizona, 384 U.S. 436, 475 (1966) (dictum) (express statement by defendant that he was willing to make statement and did not want attorney followed closely by inculpatory statement could constitute a waiver).

105. *Brewer* suggested that if the police had advised the defendant of his rights and made some attempt to determine if he wished to waive those rights before the incriminating evidence was revealed, a valid waiver might have been found. 430 U.S. at 405. Although the *Brewer* Court claimed that it was not holding that a defendant could not, in the absence of counsel, waive his right to counsel *id.* at 405–06, the rigorous manner in which the waiver standards were applied arguably suggests a contrary conclusion. Chief Justice Burger, in his dissent, stated:

> All of the elements necessary to make out a valid waiver are shown by the record and acknowledged by the Court; we thus are left to guess how the Court reached its holding.
>
> One plausible but unarticulated basis for the result reached is that once a suspect has asserted his right not to talk without the presence of an attorney, it becomes legally impossible for him to waive that right until he has seen an attorney.

Id. at 418–19 (Burger, C.J., dissenting). Even if this is not a valid interpretation of the *Brewer* majority's opinion, an express waiver of counsel will possibly be required before the strict standards of waiver can be satisfied. *See* 45 TENN. L. REV. 111, 124 (1977).

106. The facts found by the trial court probably could support a valid waiver under the *Brewer* standards. Judge Eldridge, however, argued in his dissent that several factors indicated that the state had failed to meet its heavy burden of proving that Watson had effectively waived his right to counsel. First, Hopkins did not remind Watson that his attorney had advised him not to make any statements to the police. Second, Watson was not asked if he wanted to waive his right to counsel. Third, Hopkins did not contact the defendant's attorney after the test had been completed. Judge Eldridge urged that these facts, in addition to Hopkins's failure to advise Watson of the possible consequences of proceeding without an attorney, *see* text accompanying note 111 *infra,* demonstrated that the State had failed to meet its burden of proof. 282 Md. at 88–89, 382 A.2d at 582–83 (Eldridge, J., dissenting).

107. 282 Md. at 88, 382 A.2d at 582 (Eldridge, J., dissenting).

"I understand you have something to tell me, but first of all I'm going to read you your rights," and concluded that the words, "first of all" were a clear invitation to Watson to ignore the warnings and simply proceed with a statement once the warnings were concluded, as if the warnings were a mere formality. Moreover, explained the dissenting opinion, Watson had an attorney and Hopkins did not ask Watson if he wanted to waive the assistance of his attorney.[108] Finally, Judge Eldridge was disturbed by the fact that Hopkins had flatly breached his agreement with Watson's counsel not to question Watson in the attorney's absence. In light of these facts, the dissenting opinion concluded that the state had not met its heavy burden of proving that Watson had waived his rights.[109]

Although Judge Eldridge's analysis is consistent with the *Brewer* standards, it appears to reflect a belief that a stricter set of standards applies than *Brewer* actually required. The *Brewer* Court had stated that its "strict [waiver] standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings."[110] From this, Judge Eldridge summarily concluded that an effective waiver of the right to counsel requires that the individual must have made the waiver with "an apprehension of the nature of the charges, . . . the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."[111] The standard suggested by Judge Eldridge is based on the inquiry that a trial judge must undertake prior to a defendant's waiver of his right to counsel at a trial in which the accused will proceed pro se.[112]

It is doubtful that *Brewer* contemplated such an exacting standard. In stating that the waiver standard of an intentional relinquishment of a known right, which applies to a waiver of counsel at trial, would also apply to a pretrial waiver, the *Brewer* Court apparently intended only to demonstrate that it was rejecting the voluntary waiver standard adopted in *Schneckloth v. Bustamonte*[113] for the waiver of fourth amendment rights. The *Bustamonte* standard requires that a waiver of an individual's fourth amendment rights through consent to a search must only be voluntary and, unlike the waiver of counsel standard in *Brewer,* does not require that the individual have actual knowledge of the right that he is waiving.[114] Practical considerations,[115] as well as the actual language of *Brewer,* suggest that Judge Eldridge's waiver standard is too strict.

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108. *Id.* at 88-89, 382 A.2d at 582-83 (Eldridge, J., dissenting).

109. *Id.* at 89, 382 A.2d at 583 (Eldridge, J., dissenting).

110. 430 U.S. at 404.

111. 282 Md. at 87, 382 A.2d at 582 (Eldridge, J., dissenting) (quoting Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948)).

112. *See* note 111 *supra.*

113. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

114. *See id.* at 224-49.

115. Because a policeman is not qualified to inform a defendant of all possible charges, defenses, and punishments and then adequately to determine whether all of

The waiver analysis of the *Watson* majority also ventures beyond the scope of *Brewer*. By implying that, to be admissible, a statement must be voluntary even if it is given after an effective waiver of counsel, the Watson majority appended a fifth amendment self-incrimination standard to the sixth amendment waiver standard adopted in *Brewer*. In fact, *Brewer* avoided any examination of fifth amendment issues.[116] Watson's statement was held admissible only because he made it *freely* after knowingly and intelligently waiving his right to counsel.[117] The majority's ruling that Watson "took matters into his own hands"[118] is evidence of its belief that the statement had been given voluntarily. Although the *Brewer* Court's decision on the admissibility of the incriminating statements was based solely on whether there had been an effective waiver of sixth amendment rights,[119] the *Watson* court was apparently of the opinion that waiver alone is not sufficient to make an incriminating statement admissible.[120] Although expressed in slightly different language, this view seems remarkably similar to the *Miranda* waiver standard, which requires a knowing, intelligent, and voluntary waiver.[121] The *Watson* majority's mode of analysis indicates that it failed to recognize the significant difference between the sixth amendment right to counsel, as defined in *Brewer*, and the judicially created fifth amendment right to counsel, as defined in *Miranda*. The sixth amendment right to counsel attaches only after a criminal investigation has focused on a particular individual,[122] while the fifth amendment "right" to counsel, which is designed solely to protect the right against compelled self-incrimination, applies to persons subjected to a custodial interrogation after arrest.[123] This difference suggests that a court's analysis of an alleged sixth

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these factors are understood, it would seem impractical to attempt to apply the trial-level waiver procedures at the pretrial stages of a criminal proceeding. A neutral magistrate or judge would be the only person qualified to administer this procedure, and even the "per se" rule, described at text accompanying notes 74 to 76 *supra*, does not contemplate the involvement of judges or magistrates as a prerequisite to a valid pretrial waiver of counsel.

116. 430 U.S. at 397-98.

117. 282 Md. at 82, 382 A.2d at 579.

118. *Id.* at 84, 382 A.2d at 580.

119. 430 U.S. at 397-98.

120. Some commentators have argued that the *Brewer* Court did not discuss the fifth amendment self-incrimination issue because it wanted to avoid overruling *Miranda*. *See* 38 LA. L. REV. 239, 249 (1977); 29 U. FLA. L. REV. 778, 784-85 (1977). The Court, however, did not rule that compelled self-incrimination could not be an issue if a valid waiver was found; it simply held that it did not have to reach the fifth amendment issue because it could uphold the reversal of the defendant's conviction on sixth amendment grounds. 430 U.S. at 397-98. The Maryland Court of Appeals apparently did not regard *Brewer* as precluding inquiries into fifth amendment voluntariness after an effective waiver of sixth amendment rights has been found, and this certainly seems to be a valid interpretation.

121. Miranda v. Arizona, 384 U.S. 436, 475 (1966).

122. *See* note 26 and accompanying text *supra*.

123. *See* notes 32 to 35 and accompanying text *supra*.

amendment waiver should, at least in some cases, be much more rigorous than an inquiry into the waiver of *Miranda* rights.[124]

The Court of Appeals decision carries with it three implications. First, the courts of Maryland will only be required to apply superficially the *Brewer* waiver standards to the facts of cases before them. Second, the courts may have to engage in this exercise even if the defendant's statement is not the product of an interrogation. Third, after an effective waiver of sixth amendment rights is found, an inquiry must be made into fifth amendment voluntariness.[125] In *Watson* the Court of Appeals, while purporting to apply *Brewer* to the facts before it, has formulated an opinion that strongly suggests that the rigorous scrutiny required by *Brewer* will not have to be applied. Therefore, it appears unlikely that *Brewer* will have a significant impact on Maryland law.

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124. *See* United States v. Satterfield, 558 F.2d 655, 657 (2d Cir. 1977) (quoting Friendly, J., dissenting in United States v. Massimo, 432 F.2d 324, 327 (2d Cir. 1970), *cert. denied,* 400 U.S. 1022 (1971)); Y. Kamisar, *Foreword:* Brewer v. Williams — *A Hard Look at a Discomforting Record,* 66 GEO. L. J. 209, 241 (1977). For a comparison, see the rather lenient waiver standard applied to *Miranda* waivers in United States v. Hayes, 385 F.2d 375 (4th Cir. 1967), *cert. denied,* 390 U.S. 1006 (1968).

125. A fourth implication of the court's opinion, suggested by Judge Eldridge in his dissent, is that agreements made between the police and defense attorneys will not be recognized by the courts as legally binding. 282 Md. at 90–91, 382 A.2d at 583–84 (Eldridge, J., dissenting). Judge Eldridge argued that cooperation between the defense attorneys and the state, which is necessary to the orderly and efficient administration of justice, would be discourged if the courts allowed the state to breach its agreements with defense attorneys. *Id.* Although it is possible that Hopkins did not breach his agreement with Watson's attorney, the majority did not recognize the agreement. This failure may, therefore, have a negative effect on an attorney's willingness to cooperate with law enforcement officials in the future.

A LEGAL PROCESS ANALYSIS FOR A STATUTORY AND CONTRACTUAL CONSTRUCTION OF NOTICE AND PROOF OF LOSS INSURANCE DISCLAIMERS — *GOVERNMENT EMPLOYEES INSURANCE CO. v. HARVEY*

In *Government Employees Insurance Co. v. Harvey*,[1] the Maryland Court of Appeals examined an automobile liability insurance policy in light of two apparently conflicting provisions of the Maryland Code. Government Employees Insurance Company (GEICO) issued Harvey a policy pursuant to Maryland's version of no-fault automobile insurance.[2] Under the no-fault Personal Injury Protection Amendment[3] (PIP), insurers must provide minimum medical, hospital, and disability benefits in motor vehicle liability insurance policies.[4] A basic purpose of no-fault insurance is to implement fast, efficient payment of claims on a first party basis (direct payment by insurer to insured) without resorting to lengthy legal proceedings.[5] Insurers, however, may condition payment of benefits upon the insured's timely submission of proof of loss.[6] According to article 48A, section 544(a)(1) of the Maryland Annotated Code[7] as it read in 1976, insurers "may prescribe a period of not less than six months after the date of the accident within

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1. 278 Md. 548, 336 A.2d 13 (1976).

2. MD. ANN. CODE art. 48A, §§ 538-547 (Cum. Supp. 1976). Maryland has not adopted the "pure" no-fault system. A pure no-fault plan would entirely eliminate the negligence system as a means of compensating traffic accident victims. The tort liability system in such a plan is replaced by extensive compulsory no-fault benefits. Maryland's scheme prescribes additional coverages that must be included in every automobile liability insurance policy. Such a policy must be purchased before a Maryland citizen can legally drive in the state. Report of Professor Roger C. Henderson to Special Committee on Uniform Motor Vehicle Accident Reparations Act, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (April 1976), *excerpts reprinted in* H. SHULMAN, F. JAMES & O. GRAY, CASES AND MATERIALS ON THE LAW OF TORTS 667, 669 (3d ed. 1976).

3. MD. ANN. CODE art. 48A, §§ 538-547 (Cum. Supp. 1976).

4. Section 539 provides:

> No policy of motor vehicle liability insurance shall be issued . . . unless the policy also affords the minimum medical, hospital and disability benefits set forth herein. . . . The minimum medical, hospital and disability benefits shall include up to an amount of $2,500, for payment of all reasonable expenses arising from the accident and incurred within three years from the date thereof. . . . The insurer providing loss of income benefits may require, as a condition of receiving such benefits that the injured person furnish the insurer reasonable medical proof of his injury causing loss of income.

Id. § 539 (Cum. Supp. 1977).

5. *See* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 1-6 (1965); J. O'CONNELL, THE INSURANCE INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 94-95 (1971).

6. MD. ANN. CODE art. 48A, § 544(a)(1) (Cum. Supp. 1976). In the legislative session following *Harvey* the phrase "proof of loss" was replaced by the words "claim for benefits." *Id.* (Cum. Supp. 1977). This change in language does not seem to alter the respective rights between insurers and insureds. *See* note 53 *infra*.

7. MD. ANN. CODE art. 48A, § 544(a)(1) (Cum. Supp. 1976).

which the original *proof of loss* with respect to a claim for benefits must be presented to the insurer."[8] GEICO's proof of loss provision was consistent with this statutory prescription.[9]

Viewed in isolation from other provisions of the Insurance Code, section 544 might seem to authorize disclaimer of PIP benefits when proof of loss is submitted late. Section 482 of article 48A, however, provides that an insurance company may not disclaim liability if an insured fails to comply with certain policy provisions unless the insurer establishes that such failure has caused it actual prejudice. Section 482 provides:

> Where any insurer seeks to disclaim coverage on any policy of liability insurance issued by it, on the ground that the insured . . . breached the policy by failing to cooperate with the insurer or by not giving *requisite notice* to the insurer, such disclaimer shall be effective only if the insurer establishes . . . that such lack of cooperation or notice has resulted in actual prejudice to the insurer.[10]

Statutes similar in purpose to section 482 have been widely adopted and are designed in most cases to protect insureds from disclaimers that may be grounded in technical irregularities.[11] Prior to enactment of section 482, an insurer was not required to have suffered prejudice to be able to disclaim liability upon an insured's noncompliance with a notice condition precedent.[12]

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8. *Id.* (emphasis supplied).

9. GEICO's proof of claim provision provided:

> As soon as practicable, within a period not to exceed 6 months after the date of the accident, the *injured person,* or someone on his behalf, shall submit to the Company written proof of claim including full particulars of the nature and extent of the injuries and treatment received and contemplated and such other information as may assist the Company in determining the amount due and payable.

Brief for Appellant, Record at E-4, Government Employees Ins. Co. v. Harvey, 278 Md. 548, 366 A.2d 13 (1976) (emphasis in original).

10. MD. ANN. CODE art. 48A, § 482 (1972) (emphasis supplied).

11. 13 G. COUCH, ON INSURANCE 2d § 49:5 (2d ed. R. Anderson 1965).

12. Watson v. United States Fidelity & Guar. Co., 231 Md. 266, 189 A.2d 625 (1963). Decisions prior to *Watson,* without specifically addressing the issue of prejudice, held that when an insured failed to comply with a condition precedent an insurer could disclaim liability. Lennon v. American Farmers Mut. Ins. Co., 208 Md. 424, 118 A.2d 500 (1955) (notice of the accident and suit); Employer's Liab. Assur. Co. v. Perkins, 169 Md. 269, 181 A. 436 (1935) (notice of the suit). *See* State Farm Mut. Auto. Ins. Co. v. Hearn, 242 Md. 575, 582-83, 219 A.2d 820, 824 (1966) (written notice of the accident).

In instances of noncooperation by an insured, the Maryland rule prior to Fidelity & Cas. Co. v. McConnaughy, 228 Md. 1, 179 A.2d 117 (1962), was that the insurer did not have to establish prejudice prior to disclaiming liability. After *McConnaughy,* insurers were deemed to have the burden of establishing prejudice in such instances. Travelers Ins. Co. v. Godsey, 260 Md. 669, 673, 273 A.2d 431, 434 (1970).

In *Harvey,* the Court of Appeals had to determine whether the requirement of actual prejudice, made applicable to notice conditions precedent by section 482 also applied to insurance disclaimers grounded on an insured's failure to submit timely proof of loss under section 544(a)(1).

On December 24, 1973, Geneva Harvey sustained injury in an automobile accident. Harvey notified GEICO of the accident by mailing the appropriate accident report on January 3, 1974. GEICO responded in a letter dated January 8, enclosing claim forms to be returned "as soon as possible." On two occasions GEICO advised Harvey's attorney that a proof of loss claim had to be submitted within six months of the accident, or recovery under the policy would be barred.[13] Despite these warnings, Harvey's attorney forwarded the requisite forms on August 13, 1974, seven weeks after the six-month period had expired.[14] Because the claim forms had arrived late, GEICO refused to honor Harvey's claim.[15] Harvey sued GEICO in the District Court of Maryland and recovered a $747 award. The Baltimore City Court affirmed this award on appeal, holding that section 482's prejudice provisions applied to a failure to submit timely proof of loss.[16] Because

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13. Ironically, no-fault insurance is supposed to be "lawyerless" insurance. Upon injury in an accident, one supposedly need only submit a claim in order to receive payment from one's own insurance company. The Sun (Baltimore), Nov. 26, 1971, § A, at 1, col. 3. *See* O'Connell, *Contracting for No-Fault Liability Insurance Covering Doctors and Hospitals,* 36 MD. L. REV. 553, 555 (1977).

14. This inaction by Harvey's attorney raises interesting malpractice possibilities. One commentator, however, has pointed out that attorneys often overlook notice and proof deadlines. Apparently, insurance companies often implicitly or explicitly waive such requirements. Sperry & Barker, *Notice and Proof of Loss — Pitfalls for the Unwary,* 18 S. TEX. L.J. 31, 31 (1977).

15. GEICO issued insurance to Harvey subject to the condition that "No action shall lie against the Company unless as a condition precedent thereto, there shall have been full compliance with all terms of this amendment." Brief for Appellant at 5, Government Employees Ins. Co. v. Harvey, 278 Md. 548, 366 A.2d 13 (1976) (emphasis omitted).

16. 278 Md. at 552, 366 A.2d at 16. The trial court perceived that the intent of the PIP legislation was to "provide compulsory medical payment insurance, implemented by a mandatory provision from which the insurer should not easily escape." Brief for Appellant, Record at E-24, Government Employees Ins. Co. v. Harvey, 278 Md. 548, 366 A.2d 13 (1976). The trial judge had additional reasons for finding that § 544(a)(1) in conjunction with § 482, forbade disclaimer unless the insurer established prejudice. First, the court asserted that § 482 has an actual prejudice requirement. The trial court, however, apparently ignored the language in § 482 which limits the burden of establishing prejudice to situations in which "requisite notice" or "cooperation" is at issue. It also discussed a number of cases, decided during the period in which Maryland followed the "no need for prejudice rule," *see* note 12 *supra,* in which the Court of Appeals had nevertheless addressed the need of an insurer to establish prejudice prior to disclaiming liability. This exception applied to policies issued pursuant to the absolute liability provision of the Motor Vehicle Financial Responsibility Act, MD. ANN. CODE art. 66½, § 131(a)(6)(F) (superceded by art. § 66½, § 7-324 (1970) (repealed 1972)). *See* Barella v. Stewart, 228 Md. 378, 179 A.2d 886 (1962) (because the injured members of the public are sought to be protected, the policies are construed liberally to accomplish their purpose; ordinary defenses of late notice or

GEICO had failed to demonstrate prejudice at the trial court level, the court ruled that the contract clause could not be used to prevent Harvey from recovering under the policy.[17] On appeal from the Baltimore City Court,[18] the Maryland Court of Appeals reversed, holding that a proof of loss condition precedent lay outside the ambit of section 482,[19] and that in view

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noncooperation are unavailable to the insurer); Fidelity & Cas. Co. v. McConnaughy, 228 Md. 1, 179 A.2d 117 (1962). This act provided that an operator's license and the owner's registration would be suspended upon involvement in serious accidents unless a security deposit was posted to cover any judgment arising from the accident. Proof of future financial responsibility also had to be provided. National Indemn. Co. v. Simmons, 230 Md. 234, 236-37, 186 A.2d 595, 597 (1962). The act was intended to "protect the public from the reckless operation of motor vehicles by irresponsible drivers and to assure the ability of operators and owners against whom judgments may be entered on account of negligent driving to respond in damages to persons who may suffer as the result of such negligence." *Id.* at 237-38, 186 A.2d at 597. Under such third party liability insurance policies, the Court of Appeals found it unreasonable to permit an innocent victim's rights to depend upon the omissions of the party who caused the accident. *Id.* at 242-43, 186 A.2d at 600. The rationale of the "absolute liability" cases also extends to PIP policies. *See* text accompanying note 65 *infra*.

Although not raised by the lower court, an alternative interpretation would find § 482 applicable to late proof of loss by equating a failure to submit a timely proof with a failure to cooperate. Arguably, when the drafters of § 482 chose the word "cooperate," they selected a word of broad potential meaning. Plainly understood, "cooperate" connotes action on behalf of the insured which "assists" and does not "impede." A cooperation clause, in fact, has been construed to obligate an insured to abide by the terms of the policy. *See* Fidelity & Cas. Co. v. McConnaughy, 228 Md. 1, 13, 179 A.2d 117, 123 (1962). "Failure of cooperation" has been established by a refusal to do a positive act. 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4771 (1962). *Cf.* State Farm Mut. Auto. Ins. Co. v. Wendler, 117 Ga. App. 227, 160 S.E.2d 256 (1968) (wilfullness and fraud are essential ingredients to substantiate the defense of failure to cooperate).

The duty to cooperate, however, has been distinguished from the requirement to give notice. Rochon v. Preferred Accident Ins. Co., 118 Conn. 190, 197, 171 A. 429, 432 (1934); 8 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE 281 n.1 (3d ed. F. Lewis 1965). *Compare* 8 *id.* § 342.11 *with* 8 *id.* § 341.1. Past cases have in fact uniformly treated the "failure to cooperate" clause as a term of art in insurance policies, *see, e.g.*, Travelers Ins. Co. v. Godsey, 260 Md. 669, 273 A.2d 431 (1970); Fidelity & Cas. Co. v. McConnaughy, 228 Md. 1, 179 A.2d 117 (1962); Farm Bureau Mut. Auto. Ins. Co. v. Garlitz, 180 Md. 615, 26 A.2d 388 (1942), to signify the insured's duty to make a "fair, frank and truthful disclosure to the insurer for the purpose of enabling it to determine whether or not there is a genuine defense, and the obligation in good faith, both to aid in making every legitimate defense to the claimed liability and to render assistance in the trial." Travelers Ins. Co. v. Godsey, 260 Md. at 673, 273 A.2d at 433-34 (citations omitted). Thus, in view of the established meaning of the term "cooperation," the legislature apparently did not intend to incorporate the failure to provide timely proof as a possible type of noncooperation.

17. *See* Brief for Appellant, Record at E-27, Government Employees Ins. Co. v. Harvey, 278 Md. 548, 366 A.2d 13 (1976).

18. The Court of Appeals granted certiorari pursuant to MD. CTS. & JUD. PROC. CODE ANN. § 12-305 (Cum. Supp. 1976).

19. 278 Md. at 553, 366 A.2d at 17.

of the legislative authorization contained in section 544 permitting a time limit for submission of proof of loss, GEICO had a contractual right to deny liability.[20]

In reaching this conclusion, the Court of Appeals first examined the history of section 482 in order to determine its applicability to a proof of loss provision. According to the court, this section was enacted in response to the rule of law stated in an earlier Court of Appeals decision,[21] *Watson v. United States Fidelity and Guaranty Co.*[22] Chief Judge Murphy explained that in *Watson* the insured failed to give timely notice of an automobile accident, and that because Watson failed to comply with the notice condition precedent in his liability insurance policy, the insurer was found to have had a contractual right to disclaim liability regardless of whether the insurer had suffered prejudice by receipt of late notice.[23] The *Harvey* court continued its analysis by examining the legislative enactments that followed the *Watson* decision and noted that section 482, as originally introduced before the General Assembly, required an insurer to prove that it had been actually prejudiced before it could disclaim liability "for any reason."[24] The Court of Appeals pointed out that prior to final adoption of this section the words "for any reason" were deleted,[25] and as ultimately enacted, an insurer's obligation to establish actual prejudice was limited only to those instances when a disclaimer was based on an insured's "[failure to] cooperate with the insurer or by not giving requisite notice to the insurer."[26] In the final step of his analysis Chief Judge Murphy asserted, without citing any authority, that the distinction between "proof of loss" and "notice of accident" is well recognized.[27] From this rather brief examination of the history and language of section 482, the court concluded that its provisions do not apply to disclaimers based on an insured's failure to submit timely proof of loss.[28] Thus, under the court's holding, unless compliance with the proof of loss condition is waived, a failure to comply with the proof provision bars recovery on the policy.

The court, however, prematurely held section 482 to be inapplicable to a late proof of loss. If section 482 had been examined in light of the legislative purposes behind its enactment, the *Harvey* court would have been led to conclude that the section covered proof of loss. The court's conclusion that

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20. *Id.* at 554, 366 A.2d at 17.

21. *Id.* at 552, 366 A.2d at 16. The court's conclusion rested on the inference it drew from the fact that § 482 was enacted at the 1964 legislative session, which was the legislative session following the decision in Watson v. United States Fid. & Guar. Co., 231 Md. 266, 189 A.2d 625 (1963). *See* note 24 *infra.*

22. 231 Md. 266, 189 A.2d 625 (1963).

23. *See id.* at 272-73, 189 A.2d at 627-28.

24. 278 Md. at 552, 366 A.2d at 16-17. For the official text of the bill, see ch. 185, § 1, 1964 Md. Laws 444.

25. 278 Md. at 532, 366 A.2d at 16-17.

26. *See* text accompanying note 10 *supra.*

27. 278 Md. at 553, 366 A.2d at 17.

28. *Id.*

section 482 does not apply to proof of loss provisions rested upon the assertion that "proof of loss or claim is separate and distinct from notice of accident."[29] Because the opinion does not cite any authority distinguishing the nature and purpose of notice and proof of loss provisions, this conclusion appears to be based primarily upon the rule of statutory interpretation that unambiguous statutory language usually renders statutory construction unnecessary and unwarranted.[30] The assumption that section 482's language unambiguously excludes proof of loss provisions, however, is open to question. According to the court, the main purpose of a proof of loss provision is to "acquaint the insurance company with certain facts and circumstances as relative to the loss, forming a basis for further steps to be taken by the company."[31] This same basic rationale, however, is recognized both in Maryland and elsewhere as applying to notice clauses in insurance policies.[32] Other jurisdictions, moreover, have recognized that proof of loss constitutes notice to the insurer,[33] and that notice may serve as proof of loss.[34] Finally, a previous Court of Appeals decision stated in dictum that proof of loss constitutes notice to the insurer as to what has been damaged.[35] The similarity of purpose for the two types of provisions, combined with the previous treatment of proof of loss as a form of notice, indicates that sufficient ambiguity exists in section 482 to permit the interpretation that it covers proof of loss provisions. This ambiguity is not resolved by the fact that GEICO included separate notice and proof of loss provisions in its policy, for the proof of loss provision was obviously designed only to permit

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29. *Id.*

30. The court stated, without elaboration, that it was "clear from the history and language of § 482 that its provisions do not apply to insurance disclaimers grounded on the insured's failure to submit proof of loss within the time specified in the policy." *Id.* Its reference to the history of § 482 was clearly confined to the substitution of "[failure to] cooperate with the insurer or by not giving the requisite notice to the insurer" for "for any reason" discussed in the text accompanying notes 24 to 26 *supra*. For examples of the application of the plain meaning rule in Maryland, see Harden v. Mass Transit Admin., 277 Md. 399, 406, 354 A.2d 817, 821 (1976); Atlantic, Gulf & Pac. Co. v. State Dep't. of Assess. & Tax., 252 Md. 173, 177, 249 A.2d 180, 182-83 (1969); Falcone v. Palmer Ford, Inc., 242 Md. 487, 494, 219 A.2d 808, 810 (1966). *See* Reynolds, *The Court of Appeals of Maryland: Roles, Work and Performance — Part II: Craftsmanship and Decision-Making*, 38 MD. L. REV. 165-67, (1978), for a criticism of the plain meaning rule.

31. 278 Md. at 553, 366 A.2d at 17.

32. *E.g.*, Lennon v. American Farmers Mut. Ins. Co., 208 Md. 424, 430, 118 A.2d 500, 502-03 (1955); Lewis v. Commercial Cas. Ins. Co., 472 Pa. 66, 74, 371 A.2d 193, 197 (1977); 8 J. APPLEMAN, *supra* note 16, § 4731; 13 G. COUCH, *supra* note 11, § 49:2, 7 AM. JUR. 2d *Automobile Insurance* § 139 (1963).

33. Pickering v. American Employer's Ins. Co., 109 R.I. 143, 160, 282 A.2d 584, 593 (1971) ("We include within the term 'notice' such items as the furnishing of a proof of claim and a copy of the summons and complaint.").

34. 8 D. BLASHFIELD, *supra* note 16, § 331.5 (where notice contains "virtually everything required to be shown by the formal proofs").

35. National Liberty Ins. Co. of America v. Thrall, 181 Md. 19, 25, 27 A.2d 353, 356 (1942) (dictum).

the company to take advantage of any separate rights section 544 might afford. Because the meaning of "requisite notice" is fairly susceptible of more than one construction and may encompass not only notice of loss but also the related concept of proof of loss, sufficient ambiguity exists to necessitate resort to statutory construction of section 482.

The objective of statutory interpretation is, of course, to ascertain and give effect to the legislature's intent.[36] The Court of Appeals has in the past applied certain rules of statutory construction as an aid in determining the legislature's intent. An examination of section 482 in light of these canons will ultimately show that this section should be read to cover proof of loss conditions. Prior to demonstrating that section 482 should be construed to cover proof of loss, an attempt will be made to continue with the analysis that the Court of Appeals should have employed upon encountering the ambiguity inherent in section 482. The arguments supporting the Court of Appeals' conclusion will be shown to be plausible but unconvincing in light of the purposes behind enactment of section 482.

POSSIBLE SUPPORT FOR THE COURT'S CONCLUSION

The language of a statute is the primary source to consider in ascertaining legislative intent.[37] Because the *Harvey* court believed that the meaning of section 482 was clear, however, the statutory language was not carefully examined. If the terms "liability insurance" and "prejudice" had been analyzed, the court would have found support for its conclusion. Section 482, by its terms, applies to *liability* insurance policies. The third party coverage of such policies means that the insurer is potentially liable for claims brought against the insured. Obviously, under this type of policy the insurer does not compensate the insured for injuries received in the accident, but instead offers coverage only to the extent of the insured's liability to a third party. In such instances, it is clear that proof of loss of an insured's injuries is unnecessary in the assessment of liability to a third person. Proof of loss provisions therefore are not included in standard automobile liability insurance policies. Thus, if standard PIP-type proof provisions are superfluous in standard liability insurance policies, then section 482 arguably was not intended to apply to a proof of loss condition, a type of provision that is in fact foreign to liability policies.[38]

This interpretation is further bolstered by a consideration of the term "prejudice" in section 482. By conditioning its policy obligations on receipt

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36. *See, e.g.*, Comptroller of the Treasury v. Mandel Re-election Comm., 280 Md. 575, 578-79, 374 A.2d 1130, 1132 (1977); Harden v. Mass Transit Admin., 277 Md. 399, 406, 354 A.2d 817, 821 (1976); Purifoy v. Mercantile-Safe Deposit & Trust Co., 273 Md. 58, 65, 327 A.2d 483, 487 (1974); Scoville Serv., Inc. v. Comptroller of the Treasury, 269 Md. 390, 393, 306 A.2d 534, 537 (1973).

37. Coleman v. State, 281 Md. 538, 546, 380 A.2d 49, 54 (1977); State v. Fabritz, 276 Md. 416, 421, 348 A.2d 275, 278 (1975), *cert. denied*, 425 U.S. 942 (1976).

38. *But see* notes 68 to 70 and accompanying text *infra*.

of timely notice, insurance companies expect to avoid the prejudice that arises from investigation of stale facts.[39] Untimely investigations may lead to serious prejudice by hindering opportunities to secure favorable settlements. Preparations for an adequate defense at trial may also be adversely affected. The ultimate form of section 482 prejudice would be liability for an adverse judgment as a consequence of late notice. The above concepts of prejudice appear to apply only in the context of liability insurance coverage. In contrast is the type of prejudice that may arise as a result of an insured's failure to submit timely proof of loss under a PIP policy. The possibilities of prejudice in the form of failed settlements, inadequate trial defenses, and adverse judgments do not arise in the PIP context. The first party coverage of a PIP policy means that the insurer is automatically liable to the insured upon the occurrence of damage covered by the policy (if policy conditions are complied with). With respect to claims filed under a PIP policy, possible prejudice to the insurer seems to be limited to administrative uncertainty and inefficiency in determining its liability to the insured.[40] Recognition of the different conception of prejudice in PIP and liability insurance contexts lends support to the *Harvey* conclusion that section 482 is inapplicable to proof of loss. In short, if the concept of section 482 prejudice is limited to the type of prejudice peculiar to liability insurance policies, it is arguable that section 482 is inapplicable to PIP insurance coverage.[41]

The historical context within which section 482 was enacted provides additional support for the court's conclusion that "requisite notice" does not include proof of loss.[42] According to this view, section 482 was a legislative response to a specific problem that had arisen in a specific Court of Appeals case, *Watson v. United States Fidelity and Guaranty Co.*,[43] in which the court construed a standard notice clause in an automobile liability insurance contract.[44] If at the time the legislature responded to *Watson*, a proof of loss provision was similarly considered to be a standard provision in automobile insurance policies, but of a nature entirely different from a notice clause, then it is arguable that the legislative response to *Watson* intended that the term "notice" in section 482 would mean something different from "proof."

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39. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Hearn, 242 Md. 575, 583, 219 A.2d 820, 825 (1966); Lennon v. American Farmers Mut. Ins. Co., 208 Md. 424, 430, 118 A.2d 500, 502-03 (1955); Brakeman v. Potomac Ins. Co., 472 Pa. 66, 74-75, 371 A.2d 193, 197 (1977).

40. *See* note 99 and accompanying text *infra*.

41. *But see* note 99 and accompanying text *infra*.

42. Upon encountering ambiguous language, insight into the legislature's intention may be obtained by examining the historical background and the particular evil that the statute was designed to correct. *See, e.g.*, Mackie v. Mayor of Elkton, 265 Md. 410, 415, 290 A.2d 500, 503 (1972); Department of Tidewater Fisheries v. Sollers, 201 Md. 603, 611, 95 A.2d 306, 309 (1953); Barnes v. State, 186 Md. 287, 291, 47 A.2d 50, 52, *cert. denied*, 329 U.S. 754 (1946).

43. 231 Md. 266, 189 A.2d 625 (1963).

44. *See* notes 21 & 22 *supra*.

A few jurisdictions have in fact explicitly decided that notice and proof clauses in automobile insurance policies are different provisions that embody distinct concepts.[45] Although there is no Maryland authority to support this view, it is nevertheless plausible to conclude that "notice," as used in section 482, was intended as a term of art applicable only to the type of notice provision that was at issue in *Watson*.

A further aid in establishing the legislative intent is found in the rule of statutory construction which provides that legislative acts in derogation of the common law should be strictly construed.[46] Under the common law approach, an insured's breach of a condition precedent would allow an insurer to disclaim liability whether or not the insurer suffered prejudice. Because section 482's proof of prejudice requirement is in fact in derogation of the common law rule, strict construction of this section dictates the exclusion of any implication that the General Assembly was concerned with more than the specific problems of "notice" and "noncooperation" in automobile liability insurance policies. Although this canon mandates strict statutory construction, it is effectively nullified by an equally relevant opposing maxim that remedial statutes are to be broadly construed.[47] Upon viewing the circumstances prior to the enactment of section 482 it becomes clear that this measure was enacted as a remedial device to correct the harshness and inequity resulting from disclaimers of insurance liability even when insurers had not been prejudiced by the insured's breach of a condition precedent.[48] Given the purpose of section 482, a broad construction of this section could encompass proof of loss. However, in view of the conflict in reading section 482 as both a remedial statute and as a statute in derogation of the common law the inquiry into legislative intent must proceed by examining other more fruitful indicators of intent.

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45. 8 D. BLASHFIELD, *supra* note 16, § 331.1 (in automobile insurance policies, notice and proof of loss are distinct concepts serving different purposes and functions). *See* Martinson v. American Mut. Ins. Co., 63 Wis. 2d 14, 216 N.W.2d 34 (1974). *See also* 13 G. COUCH, *supra* note 11, § 49:95. Notice of accident is a term of art provision that is often expressed in identical language. Brakeman v. Potomac Ins. Co., 472 Pa. 66, 73, 371 A.2d 193, 196 (1977).

46. *E.g.*, MacBride v. Gulbro, 247 Md. 727, 729–30, 234 A.2d 586, 588 (1967); Gleaton v. State, 235 Md. 271, 277, 201 A.2d 353, 356 (1964); McKeon v. State *ex rel.* Conrad, 211 Md. 437, 443, 127 A.2d 635, 638 (1957) ("strict construction" mandates the exclusion of mere implications).

47. *See* Criminal Injuries Comp. Bd. v. Gould, 273 Md. 486, 494, 331 A.2d 55, 61 (1975); State v. Barnes, 273 Md. 195, 208, 328 A.2d 737, 745 (1974); Fisher v. Bethesda Discount Corp., 221 Md. 271, 275–76, 157 A.2d 265, 268 (1960).

The conflict between these canons of statutory construction demonstrates the inherent limitations on reliance upon such rules to arrive at legislative intent. When two such relevant maxims can be applied in a given situation, the interpreter is faced with two alternatives: (1) relying on one rule and dishonestly ignoring the other; or (2) recognizing that such maxims may offer directly conflicting guidance in ascertaining legislative intent and that in such situations the only rational course of action is to conclude that one maxim nullifies the other. The two canons cited in the text offer an example of when the second alternative should be adopted.

48. *See* notes 58 & 59 and accompanying text *infra*.

Legislative activity subsequent to the *Harvey* decision may be examined for possible hindsight support of the court's interpretation of sections 482 and 544. According to the amendments adopted in the legislative session following *Harvey,* an insurer may now prescribe a period of not less than twelve months within which the claim for benefits must be presented.[49] Also, as a result of a second amendment, an insurer now has the duty to notify insureds of the latest date within which a claim may be filed.[50] If the judicial interpretation in *Harvey* had conflicted with the legislative purpose underlying enactment of section 482, it is reasonable to postulate that the amendments passed by the General Assembly in the legislative session following *Harvey* would have either: (1) modified section 482 to cover explicitly "proof of loss," or (2) altered section 544 to require a showing of prejudice prior to disclaimer of liability. Because the legislature's amendments did not include provisions requiring insurers to prove prejudice prior to disclaimers, it would appear by implication that the *Harvey* court correctly interpreted section 482. A subsequent legislative enactment, however, does not necessarily provide a clue as to the purpose or meaning of an earlier legislative act. The failure of the legislature to make amendments requiring insurers to establish prejudice prior to disclaimers for late proof of loss is not a clear indication of the original legislative purpose in enacting section 482. Nonaction by a legislative body must be recognized as providing an uncertain basis for drawing positive inferences.[51] Instead of viewing the amendments of section 544 as a legislative acquiescence[52] in the *Harvey* interpretation of section 482, it is more reasonable to regard the amendments as a limited response to mitigate the harshness of the *Harvey* result.[53]

In summary, the application of the five preceding rules of statutory construction is inconclusive. First, an examination of the statutory language indicates that section 482 is arguably inapplicable to PIP proof provisions. Next, it will be recalled that insofar as automobile insurance policies

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49. MD. ANN. CODE art. 48A, § 544(a)(1) (Cum. Supp. 1977). The original version of this section is quoted at the text accompanying note 8 *supra.*

50. *Id.* § 544(c).

51. United States v. Price, 351 U.S. 304, 310–11 (1960); Jones v. Liberty Glass Co., 332 U.S. 524, 533–34 (1947).

52. When the legislature has in effect acquiesced in a Court of Appeals construction of a statute there is a strong presumption that the statute has been correctly interpreted. Stewart v. State, 275 Md. 258, 270–71, 340 A.2d 290, 297 (1975); Shriner v. Mullhausen, 210 Md. 104, 115, 122 A.2d 570, 575 (1956). *Cf.* Hearst Corp. v. State Dep't of Assess. and Tax., 269 Md. 625, 644–45, 308 A.2d 679, 689–90 (1973) (the notion of legislative acquiescence is relevant, if at all, to a "judicial interpretation which runs contrary to legislative purpose").

53. It is interesting to note that the 1977 amendment of § 544(a)(1) substituted the words "proof of loss" for the phrase "claim for benefits." MD. ANN. CODE art. 48A, § 544(a)(1) (Cum. Supp. 1977). The change in language here does not seem to alter the respective rights between insurers and insureds. In other words, if an insured submits his claim for benefits 12 months after the date of the accident, the insurer, under the *Harvey* analysis, will be able to disclaim liability without establishing prejudice.

historically have classified information into separate notice and proof of loss clauses, legislative knowledge of this practice would indicate that the legislature restricted the meaning of "requisite notice" to the type of provision found in the *Watson* case. This interpretation, however, was neither supported nor weakened by the application of three other relevant canons. The rule of strict construction of statutes in derogation of the common law is effectively nullified by the equally applicable canon which mandates that remedial statutes should be broadly construed. Finally, although the legislative enactments following *Harvey* may by implication provide a measure of support for the court's conclusion, this method of discerning legislative intent must be viewed as too speculative.

Although the foregoing analysis does not conclusively determine the appropriate construction of section 482, a distillation of the preceding arguments might plausibly permit the conclusion that the *Harvey* court reached a defensible result. This conclusion, however, is not supported by an analysis of the fundamental purposes behind enactment of section 482. It is submitted that once section 482 is properly analyzed in terms of its original legislative purpose, it will be seen that "requisite notice" may reasonably be construed to cover proof of loss.

LEGISLATIVE PURPOSE

If section 482 is to make sense, it must be read in light of some assumed purpose.[54] In other words, ascertainment of the legislative intent requires an examination of the purpose to be attained[55] and the evil sought to be remedied.[56] As noted by the *Harvey* court, the legislature enacted section 482 in response to the *Watson* rule,[57] which permitted the insurer to disclaim liability regardless of whether the insurer had suffered prejudice[58] whenever an insured breached a policy condition precedent. It is clear that the legislature understood the *Watson* decision to foster undesirable social consequences. Insight into the purposes behind enactment of section 482 can be gained by hypothesizing why the *Watson* rule represented unsatisfactory social policy. First, an aura of unfairness emanates from a situation in which an insurance company is permitted to disclaim liability when it is not prejudiced by the insured's breach of a condition precedent. In such a

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54. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,* 3 VAND. L. REV. 395, 400 (1950).

55. *E.g.,* Criminal Injuries Comp. Bd. v. Gould, 273 Md. 486, 495, 331 A.2d 55, 62 (1975); Mass Transit Admin. v. Baltimore County Revenue Auth., 267 Md. 687, 695, 298 A.2d 413, 418 (1973). *See* Truitt v. Board of Pub. Works, 243 Md. 375, 394-95, 221 A.2d 370, 382 (1966).

56. *E.g.,* State v. Fabritz, 276 Md. 416, 421, 348 A.2d 275, 278 (1975), *cert. denied,* 425 U.S. 942 (1976); Mackie v. Mayor of Elkton, 265 Md. 410, 415, 290 A.2d 500, 503 (1972); Department of Tidewater Fisheries v. Sollers, 201 Md. 603, 611, 95 A.2d 306, 309 (1953).

57. Government Employees Ins. Co. v. Harvey, 278 Md. at 552, 366 A.2d at 16.

58. 231 Md. 266, 189 A.2d 625 (1963).

situation, the insurer receives an unjustifiable windfall. Second, the *Watson* rule allows an unreasonable forfeiture by permitting the insurer's assertion of a technical irregularity to deny protection for which the insured has paid. Finally, allowing an insurer to disclaim liability has the undesirable effect of leaving victims of automobile accidents uncompensated by their paid-for insurance coverage. Although these three factors illuminate the purposes underlying section 482, a consideration of these broad concerns without other indicia of legislative intent provides insufficient guidance to interpret this section correctly. In order to clarify the situation that the legislature intended to remedy, the inquiry must include an examination of the *Watson* notice clause.[59]

The objective in comparing the information requested in the *Watson* notice condition clause with the information requested in the *Harvey* proof condition is to establish that the character of the information requested by the two provisions is so similar that GEICO's proof clause must be placed within the ambit of the purposes of section 482. The condition in Watson's insurance policy requested the following information:

> In the event of an accident, occurrence, or loss, written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the insured and of available witnesses, shall be given by or for the Insured to the Company . . . as soon as practicable.[60]

In comparison, the GEICO proof of loss condition requested from the insured "full particulars of the nature and extent of the injuries and treatment received and contemplated and such other information as may assist the Company in determining the amount due and payable."[61]

At first impression it appears that the two clauses differ in that one requires names, addresses, and circumstances, and the other requires full particulars of injuries and treatment. More fundamentally, however, it is apparent that these clauses neither request information so basically different in nature, nor entail a different type of obligation on behalf of the insured, so as logically to subject one but not the other to automatic disclaimer. The *Harvey* court found that the main purpose of a proof of loss provision is to "acquaint the insurance company with certain facts and circumstances relative to the loss, forming a basis for further steps to be

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59. It is presumed that the legislature acted with full knowledge of prior decisions. *E.g.*, Harden v. Mass Transit Admin., 277 Md. 399, 406-07, 354 A.2d 817, 821 (1976); Gibson v. State, 204 Md. 423, 432, 104 A.2d 800, 805 (1954); Cline v. Mayor of Baltimore, 13 Md. App. 337, 343-44, 283 A.2d 188, 192 (1971), *aff'd*, 266 Md. 42, 291 A.2d 464 (1972).

60. 231 Md. at 269 n.1, 189 A.2d at 626 n.1.

61. Brief for Appellant, Record at E-4, Government Employees Ins. Co. v. Harvey, 278 Md. 548, 366 A.2d 13 (1976).

taken by the company,"[62] a rationale widely recognized as applicable to notice clauses in insurance policies as well.[63] Notice and proof clauses are included in insurance contracts for the same basic purpose. Only one significant difference between the provisions exists. Under the notice clause all of the information is supplied by the insured;[64] the proof clause, however, requires information that must initially be supplied by third parties outside the insured's direct control. Therefore, notwithstanding the basic similarities of the notice and proof provisions, it is clear that some of the information requested in the *Harvey* proof condition had to be corroborated by a third party and is different in this respect from that which is generally considered notice information.[65] This distinction, however, must be qualified. The GEICO proof of loss condition contained three basic components: an Application for Benefits Form, a Wage Verification Statement, and a Medical Report.[66] Significantly, the Application for Benefits Form, in contrast to the other two forms, does not require information provided by third parties and in fact constitutes the "basic and original proof of claim" specified in the policy.[67] Although, unlike the notice requirement, a certain portion of proof information required information that must be supplied by third parties, this distinction is immaterial in that notice and proof of loss clauses request the same basic type of information for the same basic purpose. The legislative intent behind section 482 is certainly not given effect if the protection an insured receives depends upon the mere label an insurance company places upon a particular item of information.

If a proof of loss provision is within the ambit of the purposes underlying the enactment of section 482, one may question the legislature's failure to include proof clauses within that section's prejudice requirement in addition to notice and cooperation provisions. Insight into this issue is provided by the legislative history of section 482 and PIP. Section 482 was enacted in response to a clause within a traditional automobile liability insurance policy.[68] Such a policy, it will be recalled, provided the insured in *Watson* with third party coverage. Upon involvement in an accident, Watson had to notify his insurer so that they could settle or defend against a

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62. 278 Md. at 553, 366 A.2d at 17.

63. *See* note 32 *supra*.

64. GEICO provided insurance coverage on the condition that:

> In the event of an accident, written notice containing details sufficient to identify the injured persons, and also reasonably obtainable information respecting the time, place, and circumstances of the accident shall be given by or on behalf of each injured person to the Company or any of its authorized agents as soon as practicable.

Brief for Appellant at 5, Government Employees Ins. Co. v. Harvey, 278 Md. 548, 366 A.2d 13 (1976) (emphasis omitted).

65. Notice requirements are fulfilled by the acts of first parties. *See* note 43 and accompanying text *supra*.

66. 278 Md. at 554, 366 A.2d at 18.

67. *Id.*

68. *See* note 57 and accompanying text *supra*.

claim brought against him. Under third party coverage, Watson's insurer was potentially obligated to pay the person with whom Watson was involved in an accident. Thus, proof of loss of Watson's own injuries was not requested by his insurer. With the advent of the first party coverage of no-fault insurance eight years after enactment of section 482, however, proof of claim conditions became standard clauses in automobile liability insurance policies. Simply because an express provision relating to a proof of claim is not included in section 482 does not mean that an insurer should automatically be able to disclaim liability when an insured submits late proof of claim. The absence of such language is irrelevant, for it would merely refer to a form of notice not explicitly considered when the statute was passed. As Professor Llewellyn points out, it may be necessary to interpret statutory language in light of circumstances that were unforeseen at the time of passage.[69] According to Llewellyn, the goal of statutory construction is to uncover the sense which can be "quarried" out of the statutory language in light of a new situation, because "[b]road purposes can indeed reach far beyond details known or knowable at the time of drafting."[70] Thus, given the broad purposes behind enactment of section 482, the ambiguity of the term "notice" in section 482, and the fact that the "notice" and "proof" conditions in GEICO's policy requested similar information for the same basic purpose, it can be forcefully argued that section 482 should be construed to cover "proof of loss" disclaimers.

Even if section 482's language is considered incapable of bearing a meaning encompassing proof of loss provisions, the court might have used section 482 to determine Maryland's public policy respecting analogous contract provisions and, having done so, incorporated that policy into the state's common law.[71] Section 482 is designed to prevent forfeitures under insurance policies whenever notice of claim is late but prejudice to the insurance company has not been shown.[72] In other words, the fault of the insured is excused as long as it does not harm the insurance company. As noted above, the basic purposes of notice and proof of loss provisions are identical, and the primary distinction between the provisions is the fact that proof of loss ordinarily requires information supplied to the insurer by a

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69. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,* 3 VAND. L. REV. 395, 400 (1950).

70. *Id.*

71. Chief Justice Stone argued that there is no adequate reason for the failure to treat statutes much more like judicial decisions, as "both a declaration and a source of law, and as a premise for legal reasoning." Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 13 (1936). For a discussion of the technique of reasoning by analogy from statutes, see the sources cited in Note, *The Supreme Court's Use of Statutory Interpretation*: Morris v. Gressette, *APA Nonreviewability, and the Idea of a Legislative Scheme,* 87 YALE L.J. 1636, 1641 n.36 (1978). *But see* Coleman v. State, 281 Md. 538, 547, 380 A.2d 49, 55 (1977); Amalgamated Cas. Ins. Co. v. Helms, 239 Md. 529, 536, 212 A.2d 311, 316 (1965).

72. *See* note 6 and accompanying text *supra.*

third person.[73] If information must be acquired from a third person, however, a greater possibility exists that the delay was not due to the fault of the insured. Actions of a third party may be beyond the insured's control. Thus, the distinction between proof of loss and notice of claim provisions, if relevant at all, militates strongly in favor of protecting those affected by the type of provision that the court concludes is not covered by section 482. If section 482 evidences disapproval of the result in *Watson*, the court certainly should not extend *Watson's* result to a class of provisions to which the legislature's purpose seems equally applicable.

Even if the underlying policy suggests that section 482 should be applied to proof of loss disclaimers, the question arises whether section 544 precludes application of section 482 to proof of loss disclaimers respecting PIP coverage. Section 544(a)(1) presently provides that PIP coverages "may prescribe a period of not less than twelve months after the date of accident within which the original claim for benefits must be presented to the insurer."[74] This language clearly permits the insurer to incorporate a provision in the policy stating the time within which the original claim for benefits must be made. The section does not, however, describe the effect resulting from a failure to comply with that time period. Under one possible construction, a failure to comply would be a breach of a condition precedent, and the breach of a condition precedent ordinarily precludes recovery on a policy. Thus, section 544 can be construed, as the *Harvey* court construed it, as an express legislative authorization of a time limit for submission of proof and an accompanying right to disclaim liability if proof is not submitted within twelve months of the accident without regard to prejudice.[75]

Such an implied right to disclaim, however, must be reconciled with the requirements of section 482. It is a basic canon of statutory construction that seemingly inconsistent statutory provisions should, if possible, be reconciled.[76] Superficially, reconciliation would seem impossible: if proof of loss is filed late and an insurer is nevertheless prevented from disclaiming liability (absent prejudice), it is nonsense to say that an insured "must" submit proof within a twelve month deadline. Thus, if section 482 is given full effect, section 544(a)(1) would arguably be reduced to surplusage. This ostensible inconsistency disappears if section 482's requirement that an insurer must prove prejudice is read as a qualification of an insurer's right to disclaim liability under section 544(a)(1). Section 544 does not describe the mechanism of, or the limits on, disclaimer — such description is clearly unnecessary because such matters have already been set out in section 482. Section 544 provides that the minimum time limit for proof of claim in PIP

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73. *See* notes 62 to 65 and accompanying text *supra*.

74. MD. ANN. CODE art. 48A, § 544(a)(1) (Cum. Supp. 1977).

75. *See* 278 Md. at 554, 366 A.2d at 17.

76. *E.g.*, Prince George's County v. White, 275 Md. 314, 319, 340 A.2d 236, 240 (1975); Mayor of Baltimore v. Clerk of the Superior Court, 270 Md. 316, 319, 311 A.2d 261, 263 (1973).

policies is twelve months. This restriction does not, however, affect in any way section 482's qualifications on the time conditions that are permitted. Although the insurer's ability to disclaim liability is conditioned by the necessity of proving prejudice, this does not mean that the condition poses no incentive for the insured to comply and no protection to the insurer. Under a PIP policy an insured must submit proof within twelve months or he will risk losing benefits if the insurer can show prejudice. In conclusion, section 544 can be interpreted as an express legislative authorization of disclaimer regardless of prejudice only if proof of claim is not within the ambit of section 482. But if proof of claim is within the scope of section 482 it is clear that section 482 does not conflict with section 544, and in fact acts as a pre-established qualification to any rights of disclaimer.

THE LAW AS IT STANDS TODAY

Regardless of how sections 482 and 544 should have been construed, the *Harvey* decision serves to clarify the rights and responsibilities of insurers and insureds. After *Harvey* and the legislative amendments that followed, an insurer of PIP coverage may deny its liability irrespective of prejudice whenever a claim for benefits is received more than twelve months after the accident. An issue not specifically addressed by the court, but which has been answered by implication, is the consequence of notifying an insurer (without submitting proof at that time) twelve months after the accident. Obviously, in this situation the PIP insurer can disclaim liability on the basis that a claim for benefits has not been timely submitted. Thus, it is clear that the insurer can effectively limit the effect of section 482 to a twelve month period by incorporating a section 544 clause into the policy. Thus, the effect of *Harvey* is to provide a means through which insurance companies can avoid the effects of a more expansive construction of section 482.

EMERGING TRENDS IN OTHER JURISDICTIONS

The present status of Maryland case law is not, of course, frozen.[77] In view of an emerging trend in other jurisdictions, and in light of the General Assembly's approval of remedial action in the area of notice and cooperation clauses, either the legislature or the Court of Appeals should overrule past precedent and require insurers to establish prejudice prior to disclaiming liability due to late proof. Because of the peculiar conditions that underlie the relationship between insureds and insurers in automobile liability insurance contracts, a number of jurisdictions have recently recognized that a strict application of traditional contract principles is inapposite, and

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77. As aptly phrased by Judge Levine: "The common law . . . is not a static body of absolute and unyielding principles . . . . [T]he genius of the common law lies in its capacity to respond to the ever-changing needs and conditions of human society." State v. Williamson, 282 Md. 100, 114-15, 382 A.2d 588, 596 (1978) (Levine, J., concurring).

required an insurer to establish prejudice in order to disclaim coverage due to an insured's breach of a policy condition.[78]

The classical contract analysis of an insurance policy would result in the enforcement of the terms of the contract as written.[79] Under the traditional approach, if an insurer alleges a breach of a policy condition, the question is simply whether the insured did in fact fulfill the particular condition.[80] The fundamental notion of freedom of contract requires a court to protect the reasonable expectations of the contracting parties.[81] Traditionally, the law will not make a better contract for the parties than that which they bargained for themselves. Under this approach, a court will not redraft an insurance policy when the intent of the parties is expressed in clear and unambiguous terms. An essential, underlying assumption of traditional contract law is the notion that a contract is a voluntary association entered into by parties of roughly equal bargaining power.[82] To the extent that this assumption does not hold true, blind adherence to traditional contract analysis is mistaken and unjust.

The rationale of the traditional approach is unpersuasive in view of the actual nature of the relationship between insureds and insurers in liability and no-fault automobile insurance policies. Because the policy conditions are largely dictated by the insurer to the insured, such contracts are not negotiated agreements in any meaningful sense.[83] In reality, the extent of coverage is the only provision in the contract over which the insured can bargain with the insurance company.[84] Furthermore, insureds are not able to choose between insurance policies that are significantly different with respect to the standard conditions written into them.[85] Policies issued by different companies often express the same conditions in identical language.[86] Oppressive bargains cannot be avoided by careful shopping.

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78. LaPlace v. Sun Ins. Office Ltd., 298 F. Supp. 764, 767 (D.V.I. 1969); State Farm Auto. Mut. Ins. Co. v. Johnson, 320 A.2d 345, 347 (Del. 1974); Cooper v. Government Employees Ins. Co., 51 N.J. 86, 93-94, 237 A.2d 870, 873-74 (1968); Brakeman v. Potomac Ins. Co., 472 Pa. 66, 71-77, 371 A.2d 193, 195-98 (1977). *See generally* Comment, *The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice,* 74 DICK. L. REV. 260 (1970).

79. *See* Whittle v. Associated Indem. Corp., 130 N.J. 576, 581, 33 A.2d 866, 869 (1943); Mueller, *Contracts of Frustration,* 78 YALE L.J. 576, 578-81 (1969).

80. Cooper v. Government Employees Ins. Co., 51 N.J. 86, 93, 237 A.2d 870, 873 (1968).

81. Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract,* 43 COLUM. L. REV. 629, 629 (1943).

82. Mueller, *Contracts of Frustration,* 78 YALE L.J. 576, 579 (1968).

83. LaPlace v. Sun Ins. Office Ltd., 298 F. Supp. 764, 767 (D.V.I. 1969); State Farm Auto. Mut. Ins. Co. v. Johnson, 320 A.2d 345, 347 (Del. 1974); Cooper v. Government Employees Ins. Co., 51 N.J. 86, 93, 237 A.2d 870, 873 (1968); Brakeman v. Potomac Ins. Co., 472 Pa. 66, 72, 371 A.2d 193, 196 (1977). *See also* Gladstone v. Fireman's Fund Ins. Co., 546 F.2d 1403, 1407 (2d Cir. 1976).

84. Brakeman v. Potomac Ins. Co., 472 Pa. 66, 72, 371 A.2d 193, 196 (1977).

85. *Id.* at 73, 371 A.2d at 196.

86. *Id.*

The assumption of voluntary association is further eroded by the fact that Maryland citizens are required by law to have both liability and PIP coverage.[87] Because such policies are required by state law, it can be persuasively argued that insurance companies, in issuing such policies, act as "agents" of the state, and that such state-required insurance policies are not purely private contracts between insurers and insureds.[88] Finally, these contractual relationships are necessarily influenced by the strong public interest in ensuring that victims of auto accidents are compensated.[89]

A classical contract approach is inappropriate for the additional reason that an insurer's disclaimer results in a forfeiture.[90] In the situation examined in *Harvey,* the insurance company accepts the insured's premiums in return for insurance coverage, and upon receipt of late proof of claim, seeks to deny the very coverage for which the insured paid. Although a proof of claim condition is not of trivial importance to insurers,[91] it is necessary to place this provision in perspective. To find a forefeiture when the insurer has not suffered prejudice as a result of the breach is simply unfair to the insureds and contrary to public interest. If the breach of condition did not contribute to or increase the risk of loss, and if the insurer is not prejudiced, there should be no forfeiture of coverage.[92] The purpose underlying notice and proof of claim provisions is to provide insurers the opportunity to acquire information in order to handle efficiently the settlement or defense of a claim.[93] When the insurer is not prejudiced by receipt of late notice or proof of claim, even absent a reasonable excuse on behalf of the insured, the purpose of the condition precedent has been fulfilled.[94] The function of notice and proof requirements is neither to provide the insurer with a technical escape hatch through which liability can be avoided when no prejudice is suffered, nor to evade the basic purpose of the insurance contract to assure that claims will be paid up to the extent to which premiums were collected.[95] In the absence of prejudice, such escape hatch provisions do not serve any legitimate purpose and offend basic notions of equity. Accordingly, they should not be given effect.

If prejudice to the insurer is to be the determining factor in deciding whether an insurer can disclaim liability, the question arises whether the insurer or insured should bear the burden of establishing the presence or

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87. *See* MD. ANN. CODE art. 48A, §§ 539, 541 (Cum. Supp. 1977).

88. *See* Brakeman v. Potomac Ins. Co., 472 Pa. 66, 72 n.6, 371 A.2d 193, 196 n.6 (1977).

89. Cooper v. Government Employees Ins. Co., 51 N.J. 86, 94, 237 A.2d 870, 874 (1968); Brakeman v. Potomac Ins. Co., 472 Pa. 66, 76 n.8, 371 A.2d 193, 198 n.8 (1977).

90. State Farm Mut. Auto. Ins. Co. v. Johnson, 320 A.2d 345, 347 (Del. 1974); Cooper v. Government Employees Ins. Co., 51 N.J. 86, 93-94, 237 A.2d 870, 873-74 (1968); Brakeman v. Potomac Ins. Co., 472 Pa. 66, 73-74, 371 A.2d 193, 196-97 (1977).

91. *See* text accompanying note 99 *infra.*

92. *See* 6 J. APPLEMAN, *supra* note 16, § 4146.

93. *See* R. KEETON, BASIC TEXT ON INSURANCE LAW § 6.8(a) (1971).

94. Brakeman v. Potomac Ins. Co., 472 Pa. 66, 75, 371 A.2d 193, 197 (1977).

95. Miller v. Marcantel, 221 So. 2d 557, 559 (La. 1969).

absence of prejudice.[96] Proving prejudice is recognized as a difficult task in instances when notice is received late.[97] Because in many cases it is impossible for the insurer to know what witnesses or facts it would have discovered if timely notice had been filed, this task in some respects resembles the burden of proving a negative. In cases of delinquent notice, assuming that the insured was not rendered unconscious or seriously disabled by the accident, it is reasonable to postulate that the insured may have more relevant facts within his knowledge concerning the accident. Thus the insured may arguably be in a better position to establish the fact that late notice did not prejudice the insurer.[98] This on-the-scene advantage, however, is largely counterbalanced by the fact that insurance companies have at their disposal investigators trained to uncover pertinent accident data. As indicated by the enactment of section 482, the public policy in Maryland with respect to this issue is to place the burden of establishing prejudice on the insurer.

Establishing prejudice resulting from the late receipt of proof of loss presents a more subtle problem. Insurance companies are, of course, in the business of attempting to predict and control risks assumed under a policy. Provisions designed to secure timely presentment of claims are advantageous to both the insurer and the insured in that they tend to keep down the cost of coverage by reducing the burden of maintaining reserves for undetermined claims.[99] But, when the insurer has been timely notified, it appears that the prejudice arising from the uncertainty that forces insurers to maintain a certain level of reserves is mitigated. If prejudice is suffered as a result of an inability to fine-tune reserves due to late proof of claim, it is

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96. Some courts place this burden on the insured. *See, e.g.*, Dairyland Ins. Co. v. Cunningham, 360 F. Supp. 139, 141 (D. Colo. 1973); Tiedtke v. Fidelity & Cas. Co., 222 So. 2d 206, 209 (Fla. 1969); Henderson v. Hawkeye-Security Ins. Co., 252 Iowa 97, 106-07, 106 N.W.2d 86, 91-92 (1960). This position has been referred to as the majority view. 8 J. APPLEMAN, *supra* note 16, § 4732. Other jurisdictions require the insurer to establish prejudice. *See, e.g.*, Powell v. Home Indem. Co., 343 F.2d 856, 860 (8th Cir. 1965); LaPlace v. Sun Ins. Office Lts., 298 F. Supp. 764, 767 (D.V.I. 1969); Lindus v. Northern Ins. Co. of New York, 103 Ariz. 160, 164, 438 P.2d 311, 315 (1968); State Farm Mut. Auto. Ins. Co. v. Johnson, 320 A.2d 345, 347 (Del. 1974); Miller v. Marcantel, 221 So. 2d 557, 560 (La. 1969); Bibb v. Dairyland Ins. Co., 44 Mich. App. 440, 445, 205 N.W.2d 495, 498 (1973); Cooper v. Government Employees Ins. Co., 51 N.J. 86, 94, 237 A.2d 870, 874 (1968); Lusch v. Aetna Cas. & Sur. Co., 272 Or. 593, 601, 538 P.2d 902, 905 (1975); Brakeman v. Potomac Ins. Co., 472 Pa. 66, 71-77, 371 A.2d 193, 195-98 (1977); Pickering v. American Employers Ins. Co., 109 R.I. 143, 160, 282 A.2d 584, 592-93 (1971); Factory Mut. Liab. Ins. Co. v. Kennedy, 256 S.C. 376, 381, 182 S.E.2d 727, 729-30 (1971); Oregon Auto. Ins. Co. v. Salzberg, 85 Wash. 2d 372, 377, 535 P.2d 816, 819 (1975).

97. Brakeman v. Potomac Ins. Co., 472 Pa. 66, 77, 371 A.2d 193, 198 (1977).

98. *Id.* at 94, 371 A.2d at 206 (Pomeroy, J., dissenting); 8 J. APPLEMAN, *supra* note 16, § 4732.

99. R. KEETON, BASIC TEXT ON INSURANCE LAW § 6.8(a) (1971).

certainly more reasonable to place the burden on the insurance company, due to its access and familiarity with its own records and calculations. In view of the public policy in Maryland as evidenced in section 482, the burden of establishing prejudice should be placed on the insurer in the case of late proof as well as for late notice. Thus, upon an insured's breach of a notice, proof, or other condition precedent, the insurer should not only be forbidden from automatically disclaiming liability under the policy; the insurer should also be required to come forward and affirmatively establish that such breach caused it actual prejudice.

CONCLUSION

In *GEICO v. Harvey* the Maryland Court of Appeals arguably misconstrued section 482 of article 48A. The result in *Harvey,* however, is not the only questionable aspect of the opinion. The analytical approach adopted by the court to arrive at its decision is also subject to criticism, as the court failed to deal sufficiently with the difficult problems of statutory construction which the case presented. The broad legislative purposes underlying enactment of section 482 were in fact largely ignored. Beyond the issue of statutory construction, however, the Court of Appeals and the General Assembly should recognize that the relationship between insureds and insurers in no-fault and liability automobile insurance policies bears little relationship to the assumptions of classical contract law.

In view of *Harvey,* and the piecemeal legislative amendments that followed, it appears that the legislature should now take up the task of fully protecting insureds from disclaimers in instances when insurers are not prejudiced by breach of a policy condition. In this regard, it is suggested that, in order to effectuate the original purpose of section 482, section 544 of article 48A be amended to provide as follows:

> Subject to the prescriptions in section 545, if for any reason an insurer seeks to disclaim liability on the coverage described in section 539, the insurer notwithstanding any provisions of the insurance policy to the contrary, shall not be relieved of liability under the insurance policy, unless the insurer can establish by a preponderance of evidence that it has been prejudiced.

To the extent that *Harvey* was based on a misconstruction of section 482, changes in section 544 will not solve all the problems with respect to an insurance company's ability to disclaim liability absent prejudice, but instead will affect only disputes arising under PIP policies. Therefore, section 482 should also be amended to provide:

> Notwithstanding any provision of the insurance policy to the contrary, any insurer seeking to disclaim coverage on any policy of insurance

issued by it on the ground that the insured, or any one claiming the benefits of the policy through the insured, has breached the policy, shall not be relieved of liability under the insurance policy unless the insurer can establish by a preponderance of evidence that it has been prejudiced.

THE LAY STANDARD OF INFORMED CONSENT: THEORETICAL AND PRACTICAL PROBLEMS WITH MARYLAND'S NEW CAUSE OF ACTION — *SARD v. HARDY*

Over the past twenty years, the doctrine of informed consent has fostered a continuing academic and judicial struggle to delineate the scope of a physician's duty to inform a patient about the nature of a proposed course of treatment.[1] The struggle has attempted to promote an intelligent exercise of a patient's right to approve his course of treatment, without interfering with a physician's ability to practice responsible and progressive medicine free from fear of frequent litigation, by imposing a duty upon the physician to disclose information about the nature, purposes, and inherent risks of each treatment necessary to an informed decision. In *Sard v. Hardy*,[2] the Court of Appeals of Maryland balanced the competing interests of patient and physician and unanimously adopted a definition of the scope of a physician's duty to disclose information to his patient.

While treating Mrs. Sard during her third pregnancy, Dr. Hardy, a physician specializing in obstetrics and gynecology, discussed the possibility of a tubal-ligation sterilization procedure.[3] Mrs. Sard agreed to the

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1. For a listing of the many articles on this subject as of 1970, see Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628, 628 n.1 (1970). For commentaries after 1970 not otherwise cited in this Comment, see Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation Of Life*, 26 RUTGERS L. REV. 228 (1973); Capron, *Informed Consent in Catastrophic Disease Research and Treatment*, 123 U. PA. L. REV. 340 (1974); Fraser & Chadsey, *Informed Consent in Malpractice Cases*, 6 WILLAMETTE L.J. 183 (1970); Kessenick & Mankin, *Medical Malpractice: The Right to Be Informed*, 8 U.S.F.L. REV. 261 (1973); Knapp, *Problems of Consent in Medical Treatment*, 62 MIL. L. REV. 105 (1973); Schneyer, *Informed Consent and the Danger of Bias in the Formation of Medical Disclosure Practices*, 1976 WIS. L. REV. 124; Skegg, *Consent to Medical Procedures on Minors*, 36 MOD. L. REV. 370 (1973); Zaslow, *Informed Consent in Medical Practice*, 22 PRAC. LAW. 13 (1976); Comment, *Informed Consent For the Terminal Patient*, 27 BAYLOR L. REV. 111 (1975); Note, *Who's Afraid of Informed Consent? An Affirmative Approach to the Medical Malpractice Crisis*, 44 BROOKLYN L. REV. 241 (1978); Comment, *Informed Consent to Immunization: The Risks and Benefits of Individual Autonomy*, 65 CALIF. L. REV. 1286 (1977); Comment, *Patients' Rights and Informed Consent: An Emergency Case for Hospitals?*, 12 CAL. W.L. REV. 406 (1976); Comment, *Informed Consent: A Malpractice Headache*, 47 CHI.-KENT L. REV. 242 (1970); Comment, *Informed Consent: The Illusion of Patient Choice*, 23 EMORY L.J. 503 (1974); Note, *The Evolution of the Doctrine of Informed Consent*, 12 GA. L. REV. 581 (1978); Comment, *New Trends in Informed Consent?*, 54 NEB. L. REV. 66 (1975); Note, *Advise and Consent in Medicine: A Look at the Doctrine of Informed Consent*, 16 N.Y.L.F. 863 (1970); Comment, *Informed Consent and the Mental Patient: California Recognizes a Mental Patient's Right to Refuse Psychosurgery and Shock Treatment*, 15 SANTA CLARA LAW. 725 (1975); Comment, *Informed Consent: A New Standard for Texas*, 8 ST. MARY'S L.J. 499 (1976); Comment, *Informed Consent: Alternatives for Illinois*, 1973 U. ILL. L.F. 739; Comment, *Informed Consent As a Theory of Medical Liability*, 1970 WIS. L. REV. 879.

2. 281 Md. 432, 379 A.2d 1014 (1977).

3. *See* note 5 *infra*.

operation, and it was subsequently performed at the same time that Dr. Hardy delivered her child by Caesarean section. Approximately two years later, Mrs. Sard again became pregnant and gave birth to a healthy child by a routine Caesarean delivery.

In a suit filed in the Circuit Court of Talbot County, Mr. and Mrs. Sard alleged that Dr. Hardy's negligent failure to advise Mrs. Sard that the sterilization procedure might not succeed in preventing future pregnancies and that alternative methods of sterilization were available precluded the Sards from giving their informed consent. In addition, they alleged that Dr. Hardy breached an express warranty of therapeutic result.[4] At trial, Mrs. Sard testified that Dr. Hardy advised that she was about to undergo her third Caesarean delivery and that people do not usually have more than three. Because Mrs. Sard had experienced complications[5] in an earlier pregnancy, Dr. Hardy had suggested three options to avoid future pregnancy: sterilization, oral contraception, or use of an intrauterine device. Mrs. Sard stated that because she had lost a lot of blood and could not afford to raise an additional child, she specifically informed Dr. Hardy that she did not want any more children. She testified that in spite of this statement Dr. Hardy had not only failed to inform her that the sterilization would not completely eliminate the possibility of a future pregnancy, but that he had also affirmatively assured her that she would not have any more children.[6] Called as an adverse witness, Dr. Hardy testified that six different techniques were available to perform a tubal-ligation sterilization. The Madlener technique, which he had used on Mrs. Sard, was the simplest to accomplish but had a two-percent risk of failure when performed at the same time as a Caesarean section. Under similar circumstances, however, the Uchida and Irving methods had failure rates of less than one-tenth of one percent. Dr. Hardy acknowledged that he had never discussed the various

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4. 281 Md. at 435, 379 A.2d at 1017. The Sards raised additional claims alleging negligence in the actual performance of the operation and during the post-operative period. *Id.* at 435 n.1, 379 A.2d at 1017 n.1. Insufficient evidence was introduced at trial to support either of these allegations and no issue relating to these claims was raised on appeal. Sard v. Hardy, 34 Md. App. 217, 221, 367 A.2d 525, 528 (1976), *rev'd*, 281 Md. 432, 379 A.2d 1014 (1977).

5. During her first pregnancy in 1965, Mrs. Sard developed eclampsia, which caused a series of severe convulsions necessitating a premature delivery by Caesarean section to save the lives of mother and child. The baby was dead at birth. Eclampsia is the occurrence of one or more convulsions caused by hypertension due to pregnancy. *See* Sard v. Hardy, 281 Md. at 435 n.2, 379 A.2d at 1018 n.2. Although he did not treat Mrs. Sard during her first pregnancy, Dr. Hardy was aware of this earlier complication. Dr. Hardy denied advising Mrs. Sard that future pregnancies would endanger her health. He admitted, however, that he signed a consultant's report stating that he felt future pregnancies would endanger Mrs. Sard's life. *Id.* at 436, 379 A.2d at 1018.

6. *Id.* In addition, Mr. Sard testified that Dr. Hardy never mentioned the alternative possibility of a vasectomy. Although unable to recall whether he had in fact advised Mr. Sard of this alternative, Dr. Hardy testified that generally it was his practice to do so. *Id.*

methods or their respective failure rates with the Sards prior to the operation.[7] In addition, he acknowledged that he had not informed Mrs. Sard that the failure rates for all of the available techniques dramatically diminished when performed at a time other than during a Caesarean delivery.

On appeal from the affirmance by the Court of Special Appeals of a directed verdict for Dr. Hardy,[8] the primary issue was whether sufficient evidence had been presented to permit the jury to decide that Dr. Hardy negligently failed to disclose that the procedure was not always successful and that alternative methods were available. Defining the applicable standards for the first time, the Court of Appeals held that

> the doctrine of informed consent imposes on a physician before he subjects his patient to medical treatment, the duty to explain the procedure to the patient and to warn him of any material risks or dangers inherent in or collateral to the therapy, so as to enable the patient to make an intelligent and informed choice about whether or not to undergo such treatment.[9]

The court defined a material risk as one which a "physician knows or ought to know would be significant to a reasonable person in the patient's position in deciding whether or not to submit to a particular medical treatment or

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7. *Id.* at 436-37, 379 A.2d at 1018. Dr. Hardy testified that it was good medical practice merely to inform the patient that a tubal-ligation would be performed without discussing the details of the surgical procedure. The physician would choose the technique to be used during the operation after there had been an opportunity to inspect the condition of the uterus. *Id.*

8. At the close of the Sards' case in chief, the trial court directed a verdict in favor of Dr. Hardy. Because the Sards had signed a consent form containing information that the sterilization procedure was not effective in all cases, the trial court ruled that the informed consent issue was conclusively settled against them. The consent form provided in pertinent part that the patient understood " 'that an operation intended to effect sterilization is not effective in all cases.' " *Id.* at 438, 379 A.2d at 1019. Mr. Sard was functionally illiterate. Mrs. Sard was given the form 15 minutes before being taken to the delivery room and signed without reading it. *Id.* at 437, 379 A.2d at 1019.

The Court of Appeals concluded that the general principles that govern a claim under the informed consent doctrine also determine the effect to be given to a standardized consent form. Although the form could be offered as evidence of the amount of information disclosed, oral or written consent would be ineffectual unless the patient had been adequately advised prior to the consent. *Id.* at 438 n.3, 379 A.2d at 1019 n.3. *See* Karp v. Cooley, 493 F.2d 408 (5th Cir.), *cert. denied,* 419 U.S. 845 (1974); Pegram v. Sisco, 406 F. Supp. 776, 779 (W.D. Ark.), *aff'd,* 547 F.2d 1172 (8th Cir. 1976). For a similar analysis, reasoning that principles applicable to arm's-length bargaining are inapplicable to the fiduciary relationship existing between a patient and his physician, see Sard v. Hardy, 34 Md. App. 217, 243-50, 367 A.2d 525, 539-47 (1976) (Davidson, J., dissenting), *rev'd,* 281 Md. 432, 379 A.2d 1014 (1977). *See generally* D. HARNEY, MEDICAL MALPRACTICE § 2.2 (1973).

9. 281 Md. at 439, 379 A.2d at 1020.

procedure."[10] It further held that the plaintiff was not required to present expert testimony to establish either the breach or the scope of the physician's duty to inform.[11] Finally, the court held that the causal nexus between the physician's failure to disclose a material risk and the plaintiff's injury would be determined by an objective standard: "whether a reasonable person in the patient's position would have withheld consent to the surgery or therapy had all material risks been disclosed."[12] Unless the plaintiff can establish that a reasonable person would have refused to consent if the risk had been disclosed, recovery will not be allowed. Applying these principles to the facts before it, the court reversed the Court of Special Appeals and remanded the case for a new trial,[13] holding that the evidence was sufficient to warrant submission to the jury the questions whether Dr. Hardy had withheld material information and whether a reasonable person would not have consented if an adequate disclosure had been made.[14]

The court then addressed the claim that Dr. Hardy had made and breached an express warranty to achieve a specific therapeutic result.[15] Although some courts hold that an express warranty is unenforceable unless supported by a separate consideration,[16] the *Sard* court believed the better

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10. *Id.* at 444, 379 A.2d at 1022.
11. *Id.* at 447, 379 A.2d at 1024.
12. *Id.* at 450, 379 A.2d at 1025.
13. *Id.* at 454, 379 A.2d at 1027.
14. *Id.* at 445-46, 450-51, 379 A.2d at 1023, 1025-27. Although employing the same informed consent standards adopted by the Court of Appeals, the Court of Special Appeals had held as a matter of law that a two-percent risk of failure would not be material to a reasonable patient's decision. 34 Md. App. at 235, 367 A.2d at 535.
15. The court apparently, although not expressly, agreed with the traditional rule that a physician is not contractually liable for the failure to effect a cure or achieve a specific result absent an express warranty to that effect. *See* Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D. W. Va. 1967); Coleman v. Garrison, 349 A.2d 8, 11 (Del. 1975); Annot., 43 A.L.R.3d 1221, 1230-31 (1972). The physician is not an insurer of the success of his treatment. Absent an express agreement to effect a specific cure, he contracts only that he possesses and will apply that degree of professional skill and learning ordinarily possessed by the average member of the profession. *See, e.g.*, Coleman v. Garrison, 349 A.2d 8, 11 (Del. 1975); Perin v. Hayne, 210 N.W.2d 609, 615 (Iowa 1973); Annot., 43 A.L.R.3d 1221, 1225 (1972). Two arguments have been advanced against imposing any contractual liability. Due to the unpredictability of medical results and the individual differences among patients, it is unlikely that honest physicians could or would promise a particular result. Further, some patients may subjectively transform a physician's expression of opinion about the expected outcome into a specific promise. *See* Sard v. Hardy, 281 Md. at 452, 379 A.2d at 1026. In response, it is argued that a failure to permit any contractual liability when a physician actually promised to effect a specific result would immunize the dishonest physician from any liability. *See id. See also* Tierney, *Contractual Aspects of Malpractice*, 19 WAYNE L. REV. 1457 (1973); Note, *Express Contracts to Cure: The Nature of Contractual Malpractice*, 50 IND. L.J. 361 (1975).
16. *See* Coleman v. Garrison, 349 A.2d 8, 11 (Del. 1975); Rogala v. Silva, 16 Ill. App. 3d 63, 65, 305 N.E.2d 571, 573 (1973); Gault v. Sideman, 42 Ill. App. 2d 96, 106-07, 191 N.E.2d 436, 441-42 (1963).

rule was that proof of a separate consideration should be required only when the warranty was made post-operatively.[17] Therefore, the court concluded that an express warranty would be enforceable if it were made prior to treatment or supported by a separate consideration.[18]

The court, however, was fearful that a patient, especially if embittered by an undesirable result, may mistake or transform a physician's "therapeutic reassurance, hopeful expression of opinion, or mere prediction of an expected outcome"[19] into an express warranty. To protect both the public and the physician, it declared that the plaintiff must prove by "clear and convincing evidence that the physician did, in fact, make the alleged [pre-operative] warranty."[20] The only evidence tending to establish that Dr. Hardy had expressly warranted that Mrs. Sard would be sterile was the alleged affirmative assurance that Mrs. Sard would not have any more children, and the court concluded that this evidence was insufficient to establish an express warranty by clear and convincing evidence.[21]

HISTORICAL CONTEXT

The doctrine of informed consent is an outgrowth of the well-recognized doctrine that a physician treating a mentally competent adult in nonemergency situations may not perform an operation or treatment without securing the prior consent of the patient.[22] Based on the premise that every

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17. 281 Md. at 452, 379 A.2d at 1026-27; *see, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 315-16, 59 Cal. Rptr. 463, 471 (1967); Herrera v. Roessing, 533 P.2d 60, 61-62 (Colo. App. 1975); Guilmet v. Campbell, 385 Mich. 57, 67 n.1, 188 N.W.2d 601, 605 n.1 (1971).

18. 281 Md. at 451, 379 A.2d at 1026-27.

19. *Id.* at 453, 379 A.2d at 1027.

20. *Id.*; *see* Sullivan v. O'Connor, 363 Mass. 579, 296 N.E.2d 183 (1973), *noted in* 24 DE PAUL L. REV. 212 (1974).

21. 281 Md. at 453-54, 379 A.2d at 1027. As illustrated by *Sard* itself, the court's requirement that a warranty be proved by clear and convincing evidence confronts plaintiffs with an almost insurmountable challenge in establishing a cause of action based on warranty. Although it may be argued that the physician would be adequately protected by a standard of proof focusing on whether a reasonable person would conclude that under all the circumstances an express warranty had been made, other courts have adopted standards similar to the clear and convincing requirement. *See* Gault v. Sideman, 42 Ill. App. 2d 96, 110, 191 N.E.2d 436, 443 (1963) (dicta) (clear and specific); Sullivan v. O'Connor, 363 Mass. 579, 296 N.E.2d 183 (1973) (clear proof); Guilmet v. Campbell, 385 Mich. 57, 70, 188 N.W.2d 601, 607 (1971) (specific, clear, and express). For an analysis of physicians' statements found to be sufficiently clear and definite to constitute an express warranty, see Annot., 43 A.L.R.3d 1221, 1234-50 (1972).

22. Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914); *see* McClees v. Cohen, 158 Md. 60, 148 A. 124 (1930); State *ex rel.* Janney v. Housekeeper, 70 Md. 162, 16 A. 382 (1889). For a discussion of what constitutes an emergency condition or incompetent patient sufficient to obviate the requirement of obtaining prior consent, see D. HARNEY, *supra* note 8, §§ 2.1(A)-(B) & 2.3; McCoid, *A Reappraisal of Liability for Unauthorized*

adult individual has the "right to determine what shall be done with his own body,"[23] the consent doctrine permits a patient to refuse to submit to a proposed treatment, even one necessary to save his life, and prohibits a physician from substituting "his own judgment for that of the patient by any form of artifice or deception," even if he believes the operation or treatment is necessary or desirable.[24] A physician must describe the type of treatment to be employed and secure the patient's consent to that treatment. By failing to obtain consent or performing a treatment beyond the scope of that consent,[25] a physician is subject to a battery action for an invasion of the patient's bodily integrity.[26] Ironically, because the critical issue is the

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Medical Treatment, 41 MINN. L. REV. 381, 395–481 (1957); Annots., 25 A.L.R.3d 1439 (1969); 56 A.L.R.2d 695 (1957); 139 A.L.R. 1370 (1942); 76 A.L.R. 562 (1932); 53 A.L.R. 1056 (1928); 26 A.L.R. 1036 (1923).

23. Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 126, 105 N.E. 92, 93 (1914) (Cardozo, J.); *see* Mohr v. Williams, 95 Minn. 261, 264, 104 N.W. 12, 14 (1905) (" 'Under a free government, . . . [a] free citizen's first and greatest right, which underlies all others [is] the right to the inviolability of his person; . . . and this right necessarily forbids a physician or surgeon . . . to violate, without permission, the bodily integrity of his patient . . . .' ") (quoting Pratt v. Davis, 37 CHI. LEG. NEWS 213 (1905)).

24. Natanson v. Kline, 186 Kan. 393, 407, 350 P.2d 1093, 1104, *clarified in & rehearing denied,* 187 Kan. 186, 354 P.2d 670 (1960). *See* Smith, *Therapeutic Privilege to Withhold Specific Diagnosis From Patient Sick With Serious or Fatal Illness,* 19 TENN. L. REV. 349 (1946).

25. Although having obtained consent to operate on one part of the patient's body, a physician would exceed the scope of that consent by operating on an additional part of the body, *see* Bang v. Charles T. Miller Hosp., 251 Minn. 427, 88 N.W.2d 186 (1958), or by mistakenly operating on a different part of the body, *see* McClees v. Cohen, 158 Md. 60, 148 A. 124 (1930). For an excellent collection and analysis of the many cases in this area, see McCoid, *supra* note 22. *See generally* D. HARNEY, *supra* note 8, §§ 2.1 & 2.3; Powell, *Consent to Operative Procedures,* 21 MD. L. REV. 189 (1961); Proctor, *Consent to Operative Procedures,* 22 MD. L. REV. 190 (1962); 37 ALB. L. REV. 591 (1973); Annot., 56 A.L.R.2d 695 (1957).

26. *See, e.g.,* Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914); Rolater v. Strain, 39 Okla. 572, 137 P. 96 (1913). Imposing liability was alternatively justified on a contractual theory. Any performance inconsistent with or outside the scope of the procedure upon which the patient and physician had agreed would be a breach of contract. *See id.*; Cooper v. Roberts, 220 Pa. Super. Ct. 260, 286 A.2d 647 (1971); Powell, *supra* note 25.

Professor McCoid strongly criticized using a battery action as the doctrinal basis of these cases, arguing that even when the physician technically exceeds the scope of the consent, he usually acts in good faith for the benefit of the patient without the malice or intent to harm normally associated with battery actions. McCoid, *supra* note 22, at 423–24. *But see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 31 (4th ed. 1971); Riskin, *Informed Consent: Looking for the Action,* 1975 U. ILL. L.F. 580, 594–95; Comment, *Informed Consent After Cobbs — Has the Patient Been Forgotten?,* 10 SAN DIEGO L. REV. 913, 919 (1973) (arguing that good faith and lack of intent to harm confuses motive with intent, and motive is irrelevant in a battery action). In addition, unauthorized operation cases usually result from a patient's disappointment when the expected cure does not develop rather than from the occurrence of a harmful medical result. *See* McCoid, *supra* note 22, at 426–27. Therefore, McCoid has suggested that battery actions should be limited only to those cases in which the physician intentionally deviated from the scope of the patient's

absence of consent, the physician can be liable even though the treatment was not harmful (or was in fact beneficial), and even though it was skillfully performed within the bounds of good medical practice.[27]

In some cases, however, the patient was injured by the occurrence of a collateral risk, inherent in the treatment, of which he had not been informed.[28] In such cases, because the patient had consented to the treatment actually performed, the consent doctrine generally did not provide the basis for a claim.[29] In response to this problem, courts developed the correlative doctrine that an effective consent must be an *informed* consent:[30]

> True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the

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consent, or those cases in which an actual medical harm resulted. In the other cases in which the physician technically deviated from or had not obtained the patient's consent, but no actual medical harm resulted, the patient's action should be in malpractice on the basis of a duty imposed by law requiring the physician to make a reasonable disclosure of all significant facts. Irrespective of the patient's actual consent, a physician would be liable only if the treatment performed or the information disclosed failed to comply with the standard of care established by the customs of the medical profession. *Id.* at 423-34.

27. *See* McCoid, *supra* note 22, at 392.

28. For example, in a thyroidectomy there is an inherent risk of damage to the recurrent laryngeal nerves possibly resulting in partial or total paralysis of the vocal chords. Such an injury is not medically preventable nor is it necessarily caused by a lack of skill or care. *See* Roberts v. Wood, 206 F. Supp. 579, 581-82 (S.D. Ala. 1962); Watson v. Clutts, 262 N.C. 153, 136 S.E.2d 617 (1964).

Within this Comment, the term "risk," rather than meaning a chance or probability, will most often be a shorthand reference for the specific hazard or harm inherent in a treatment the occurrence or materialization of which will cause some harm or injury to the patient.

29. Attempting to surmount this obstacle while conforming to a battery action, plaintiffs argued that the failure to inform them of the risk vitiated their consent. *See* Belcher v. Carter, 13 Ohio App. 2d 113, 234 N.E.2d 311 (1967); Congrove v. Holmes, 37 Ohio Misc. 95, 308 N.E.2d 765 (Ct. C.P. 1973); Cooper v. Roberts, 220 Pa. Super. Ct. 260, 286 A.2d 647 (1971); Longmire v. Hoey, 512 S.W.2d 307 (Tenn. App. 1974); W. PROSSER, *supra* note 26, at 165-66. For an argument criticizing this approach, see Plante, *An Analysis of "Informed Consent,"* 36 FORDHAM L. REV. 639, 639-65 (1968). *See generally* Shetter v. Rochelle, 2 Ariz. App. 358, 409 P.2d 74 (1965), *modified on other grounds,* 2 Ariz. App. 607, 411 P.2d 45 (1966).

30. *See* Sard v. Hardy, 281 Md. at 438-39, 379 A.2d at 1019-20; Comment, *Informed Consent in Medical Malpractice,* 55 CALIF. L. REV. 1396, 1396 (1967) [hereinafter cited as *Informed Consent*].

The informed consent doctrine might be more appropriately called the duty to disclose doctrine. The term "informed consent" suggests that the relevant inquiry is whether the patient actually possessed and comprehended sufficient information to make an informed decision. The actual inquiry, however, focuses on the nature and content of a physician's disclosure. Although an adequate disclosure is necessary to an informed consent, a physician will fulfill his duty and be free from liability as long as he discloses all material information, even if the patient fails to comprehend fully the information disclosed. *See* Canterbury v. Spence, 464 F.2d 772, 780 n.15 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972).

> options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.[31]

To insure that the consent will be intelligently given, the physician must also inform the patient of the probable outcome of the treatment to be performed, the existence of alternative treatments and their probability of success, and the potential of unfortunate consequences and risks inherent in the treatment.[32] Liability for the failure to disclose information necessary to an informed consent is more properly cast as an action in negligence, rather than battery, for the failure to adhere to a required standard of conduct.[33] Consistent with the traditional negligence formulation, the patient must establish that the physician failed to disclose an existing risk or alternative treatment of which the patient was unaware, and that the patient would not have consented if he had been properly informed.

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31. Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (footnotes omitted); *see* Cobbs v. Grant, 8 Cal. 3d 229, 241-43, 502 P.2d 1, 9-10, 104 Cal. Rptr. 505, 513-14 (1972). *See generally* Waltz & Scheuneman, *supra* note 1; *Informed Consent, supra* note 30.

32. *See, e.g.*, Natanson v. Kline, 186 Kan. 393, 406-12, 350 P.2d 1093, 1103-07, *clarified in & rehearing denied*, 187 Kan. 186, 354 P.2d 670 (1960); Sard v. Hardy, 281 Md. 432, 379 A.2d 1014 (1977); Mitchell v. Robinson, 334 S.W.2d 11 (Mo. 1960), *overruled on other grounds*, Aiken v. Clary, 396 S.W.2d 668, 675 & n.6 (Mo. 1965); Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 2d 1, 11, 227 N.W.2d 647, 653 (1975).

33. *See, e.g.*, Perin v. Hayne, 210 N.W.2d 609 (Iowa 1973); Sard v. Hardy, 281 Md. 432, 440 n.4, 379 A.2d 1014, 1020 n.4 (1977). Several courts have explicitly or implicitly accepted McCoid's criticisms, *see* note 26 *supra*, concluding that the physician's good-faith attempt to render beneficial treatment and lack of an intent to harm were inconsistent with the anti-social implications of a battery action. *See, e.g.*, Cobbs v. Grant, 8 Cal. 3d 229, 239-41, 502 P.2d 1, 7-8, 104 Cal. Rptr. 505, 511-12 (1972); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *clarified in & rehearing denied*, 187 Kan. 186, 354 P.2d 670 (1960); Trogun v. Fruchtman, 58 Wis. 2d 569, 595-600, 207 N.W.2d 297, 311-13 (1973). In addition, a negligence action avoids the theoretical contradiction that would arise in a battery action if the physician were held liable for invading the patient's body even though the patient had, in fact, consented to the invasion. The better view, therefore, is that a physician's liability arises from the breach of his duty to communicate information necessary to the patient's decision. *See* Cobbs v. Grant, 8 Cal. 3d at 240, 502 P.2d at 8, 104 Cal. Rptr. at 512; McCoid, *supra* note 22, at 426-27. For an analysis of the doctrinal and theoretical differences between battery and negligence actions and the practical effect these differences may have in reference to statutes of limitations, measures of damages, and the need for expert testimony, see Cobbs v. Grant, 8 Cal. 3d at 240, 502 P.2d at 8, 104 Cal. Rptr. at 512; A. HOLDER, MEDICAL MALPRACTICE LAW 228-29 (1975); *Informed Consent, supra* note 30, at 1400. *Compare* Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *clarified in & rehearing denied*, 187 Kan. 186, 354 P.2d 670 (1960) *with* Shetter v. Rochelle, 2 Ariz. App. 358, 409 P.2d 74 (1965); *modified on other grounds*, 2 Ariz. App. 607, 411 P.2d 45 (1966) *and* Plante, *supra* note 29, at 648, 653.

SCOPE OF DISCLOSURE — THE *Sard* STANDARD

Although most courts agree on the categories[34] of information to be disclosed, they disagree on the appropriate standard to govern the adequacy of a physician's disclosure within those categories.[35] Two fundamentally different standards defining the scope or extent of disclosure have developed. Most courts define the scope of disclosure according to a professional standard of care, which in effect leaves the definition to the medical profession itself. As in a traditional malpractice action, the professional standard requires that a physician disclose information that would have been disclosed by a reasonable medical practitioner in the same or similar circumstances.[36] In addition, the plaintiff must present expert

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34. *See* note 32 and accompanying text *supra*.

35. The disagreement results from several factors. Initially, it centered on whether all or only some information should be disclosed. Eventually, it began to focus on what level or degree of severity of harm was necessary to require disclosure in order to secure an informed consent and who should decide when disclosure was necessary. In addition, courts continue to differ on the relevant weight to be given to certain practical and medical considerations influencing the disclosure decision. Although often cited for the proposition that a full disclosure is required, the following portion of the court's opinion in Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957), demonstrates the tensions between these considerations:

> A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise the physician may not minimize the known dangers of a procedure or operation in order to induce his patient's consent. At the same time, the physician must place the welfare of his patient above all else and this very fact places him in a position in which he sometimes must choose between two alternative courses of action. One is to explain to the patient every risk attendant upon any surgical procedure or operation, no matter how remote; this may well result in alarming a patient who is already unduly apprehensive and who may as a result refuse to undertake surgery in which there is in fact minimal risk; it may also result in actually increasing the risks by reason of the physiological results of the apprehension itself. The other is to recognize that each patient presents a separate problem, that the patient's mental and emotional condition is important and in certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary for an informed consent.

Id. at 578, 317 P.2d at 181 (citation omitted).

36. *E.g.*, Patrick v. Sedwick, 391 P.2d 453 (Alaska 1964); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *clarified in & rehearing denied*, 187 Kan. 186, 354 P.2d 670 (1960); *see* Grosjean v. Spencer, 258 Iowa 685, 140 N.W.2d 139 (1966) (in accord with good medical judgment); Roberts v. Young, 369 Mich. 133, 119 N.W.2d 627 (1963) (practice customarily followed by profession in the locality); Aiken v. Clary, 396 S.W.2d 668, 675 (Mo. 1965) (reasonable medical practice). *See generally* 109 U. PA. L. REV. 768 (1961).

medical testimony to establish the existence of a duty to disclose and the physician's deviation from that standard of care.[37]

In recent years, however, an increasing number of courts have adopted a general or lay standard independent of medical custom.[38] In joining these courts, the Court of Appeals in *Sard* articulated the standards to govern future informed consent actions in Maryland.[39] The fundamental premise of

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37. *See, e.g.*, Riedisser v. Nelson, 111 Ariz. 542, 545, 534 P.2d 1052, 1055 (1975); Aiken v. Clary, 396 S.W.2d 668, 673-74 (Mo. 1965); Llera v. Wisner, 557 P.2d 805, 810-11 (Mont. 1976); Bly v. Rhoads, 216 Va. 645, 650-51, 222 S.E.2d 783, 787-88 (1976).

38. Cases from jurisdictions presently utilizing a lay standard of materiality include Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); Zeleznick v. Jewish Chronic Disease Hosp., 47 A.D.2d 199, 366 N.Y.S.2d 163 (1975); Holland v. Sisters of St. Joseph of Peace, 270 Or. 129, 522 P.2d 208, *opinion withdrawn on other grounds*, 270 Or. 129, 140, 526 P.2d 577 (1974); Getchell v. Mansfield, 260 Or. 174, 489 P.2d 953 (1971); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972); Small v. Gifford Memorial Hosp., 133 Vt. 552, 349 A.2d 703 (1975); Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 2d 1, 227 N.W.2d 647 (1975). One jurisdiction defines a breach of the fiduciary duty according to the materiality standard. Miller v. Kennedy, 11 Wash. App. 272, 522 P.2d 852 (1974), *aff'd per curiam*, 85 Wash. 2d 151, 530 P.2d 334 (1975). The materiality standard is also used to determine whether a patient's consent has been vitiated in a battery action. Congrove v. Holmes, 37 Ohio Misc. 95, 308 N.E.2d 765 (Ct. C.P. 1973); Cooper v. Roberts, 220 Pa. Super. Ct. 260, 286 A.2d 647 (1971), *noted in* 45 TEMP. L.Q. 661 (1972) & 34 U. PITT. L. REV. 500 (1973); Longmire v. Hoey, 512 S.W.2d 307 (Tenn. App. 1974). For a strong criticism of the lay standard, see Plant, *The Decline of "Informed Consent,"* 35 WASH. & LEE L. REV. 91 (1978).

39. Curiously, the court merely articulated the elements of the informed consent doctrine it would follow without seriously analyzing whether the doctrine should be adopted at all. It simply declared that the informed consent doctrine follows logically from the consent doctrine. *See* 281 Md. at 438-39, 379 A.2d at 1019. This, however, does not necessarily compel the conclusion that the consent doctrine requires adoption of an informed consent rule.

The court noted that the fundamental premise underlying the informed consent requirement is that each patient has the right of self-determination with respect to his own body, *see* text accompanying note 40 *infra*, which also is the theoretical premise underlying the consent doctrine, *see* text accompanying note 23 *supra*. Within the context of the consent doctrine, it is reasonable to posit a right of self-determination as an idealistic expression or recognition that the patient should have some right to prevent a physician from operating upon him at will. The right of self-determination prohibits a physician from performing a treatment to which his patient has not agreed and prevents a physician from tricking, seducing, or deceiving the patient into submitting to a treatment. For example, a physician cannot deceptively say he is going to perform only exploratory surgery and then amputate a patient's leg or remove part of his stomach while the patient is anesthetized. *See generally* McCoid, *supra* note 22, and cases cited therein. But the right of self-determination does not necessarily have to be an absolute, legally protected right in all circumstances, *cf.* Application of President of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.) (Wright, J., sitting as single judge to hear emergency petition) (right of hospital to administer life-saving transfusion to patient of Jehovah's Witness religion, in spite of objection by patient, believed to be incompetent to decide, and her husband), *rehearing en banc denied*, 331 F.2d 1010, *cert. denied*, 377 U.S. 978 (1964); D. HARNEY, *supra* note 8, §§ 2.1 & 2.3 (citing cases in which consent was implied even though patient did not expressly consent to treatment actually performed), especially

the doctrine is that " '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.' "[40] To protect and promote this right of self-determination adequately, the scope of

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when the net result of the treatment is medically beneficial, *see generally* notes 26 & 27 and accompanying text *supra,* nor does it compel the conclusion that the consent must be informed. The consent doctrine adequately protects against an invasion of a patient's bodily integrity, and there are plausible arguments that informed consent is simply impractical and unnecessary. *See generally* Epstein, *Medical Malpractice: The Case for Contract,* 1976 AM. BAR FOUN. RES. J. 87, 119–28. Contrary to the premise of informed consent, a patient may not want to know the inherent risks. Desiring a cure, but ignorant of medical science, a patient may willingly entrust himself to his physician's expertise and training. *See generally* Riskin, *supra* note 26, at 597 (patient becomes childlike and trustful). He expects that the physician will suggest the most appropriate treatment and trusts the soundness of that suggestion. Even if a patient is informed of the risks, it may be extremely difficult to evaluate that information. For example, it may be unrealistic to assume that a patient can actually assess the danger posed by a one-percent risk of paralysis. Furthermore, a patient may naturally minimize the significance of a risk when the predominant desire in the pre-operative setting is to secure a cure. Viewed in hindsight, however, once the risk has actually materialized, the significance of a one-percent risk may be exaggerated.

Even without the doctrine of informed consent as the basis of a cause of action, the patient may be sufficiently protected if an undisclosed risk actually materialized by traditional malpractice law, as long as the patient actually consented to the treatment. Risks are a reality of medical science and the occurrence of some bad results cannot be prevented even if the best possible skill is exercised. Society may rationally expect a person to assume some risk in pursuit of a cure. The plaintiff would be adequately protected by a malpractice suit for a negligent selection of the treatment. It is implicit that a physician, when deciding which treatment is most appropriate, will evaluate the risks inherent in a treatment and reject as unwarranted any treatment that is too dangerous. A physician who chooses a treatment with an unacceptably high degree of risk, or chooses one treatment over an equally appropriate but significantly less dangerous treatment, should be liable in malpractice.

The problem, of course, is that a physician may be partially "immunized" from liability by the requirement that malpractice be proved by expert testimony and the concomitant problems of the "conspiracy of silence." *See generally* Comment, *Malpractice and Medical Testimony,* 77 HARV. L. REV. 333, 336–38 (1963). Adoption of a national standard of conduct for physicians, *see generally* Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 187, 349 A.2d 245 (1975), *noted in* 37 MD. L. REV. 212 (1977), may alleviate this problem.

The considerations discussed above do not compel the conclusion that the *Sard* court's adoption of the informed consent doctrine was erroneous. Rather, they simply suggest that it would have been appropriate to inquire whether adoption of the doctrine legitimately advances any appropriate interest. The fact that other jurisdictions have adopted the doctrine does not mean that it was appropriate for Maryland to do so, and the experience of these courts over the past 20 years offered the *Sard* court an opportunity to reexamine the validity and utility of the doctrine.

40. 281 Md. at 439, 379 A.2d at 1019 (quoting Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 126, 105 N.E. 92, 93 (1914) (Cardozo, J.)). *See also* text accompanying note 22 *supra.*

In addition, some courts characterize the physician-patient relationship as fiduciary and use this characterization either as an additional or alternative

a physician's duty to disclose must be "governed by the patient's informational needs. Thus, the appropriate test is not what the physician in the exercise of his medical judgment thinks a patient should know . . . ; rather, the focus is on what data the patient requires in order to make an intelligent decision."[41] Therefore, the court concluded that the proper scope of disclosure is that the physician must divulge any information that would be material to the patient's decision.[42] Material information is information that "a physician knows or ought to know would be significant to a reasonable person in the patient's position in deciding whether or not to submit to a particular medical treatment or procedure."[43]

Because the patient, not the physician, must decide whether to submit to a treatment, the purpose of the informed consent doctrine is to provide the patient with the information necessary to decide. Several criticisms previously levelled against the professional standard persuasively indicate that the lay standard better promotes this purpose.[44] First, critics question whether a professional standard even exists.[45] The physician must initially evaluate the emotional and physical condition of the particular patient to identify the appropriate treatments and the inherent risks existing in each.[46]

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justification for imposing a duty to disclose. A fiduciary relationship is one of trust and confidence, rather than arm's-length bargaining, and requires the recognition of the patient's reliance and dependence on the physician for his informational needs. *See* Canterbury v. Spence, 464 F.2d 772, 782 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); Sard v. Hardy, 34 Md. App. 217, 243-50, 367 A.2d 525, 539-47 (1976) (Davidson, J., dissenting), *rev'd,* 281 Md. 432, 379 A.2d 1014 (1977); Woods v. Brumlop, 71 N.M. 221, 227-28, 377 P.2d 520, 524-25 (1962); Miller v. Kennedy, 11 Wash. App. 272, 282, 522 P.2d 852, 860 (1974), *aff'd per curiam,* 85 Wash. 2d 151, 530 P.2d 334 (1975).

41. 281 Md. at 442, 379 A.2d at 1021 (citing Canterbury v. Spence, 464 F.2d 772, 785 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); Fogal v. Genessee Hosp., 41 A.D.2d 468, 344 N.Y.S.2d 552 (1973); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972); Miller v. Kennedy, 11 Wash. App. 272, 522 P.2d 852 (1974), *aff'd per curiam,* 85 Wash. 2d 151, 530 P.2d 334 (1975); Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 2d 1, 11-12, 227 N.W.2d 647, 653 (1975)).

42. 281 Md. at 443, 379 A.2d at 1022.

43. *Id.* at 444, 379 A.2d at 1022. *See generally* Waltz & Scheuneman, *supra* note 1; *Informed Consent, supra* note 30.

44. The *Sard* court summarized these criticisms with apparent approval and then declared that it would adopt the lay standard. *See* 281 Md. at 442-44, 379 A.2d at 1021-22. The court can be faulted for merely summarizing these criticisms rather than analyzing their validity, but if one begins from the premise that it is the patient's right to determine what may be done to his body, *see* text accompanying note 40 *supra,* it is clear that the court correctly determined that the lay standard better promotes and protects this right than the professional standard.

The arguments for or against either standard have been too extensively analyzed to be discussed further in this Comment. For the better commentaries in this area, see McCoid, *supra* note 22; Plante, *supra* note 29; Waltz & Scheuneman, *supra* note 1; *Informed Consent, supra* note 30.

45. *See* Sard v. Hardy, 281 Md. at 442, 379 A.2d at 1021; Wilkinson v. Vesey, 110 R.I. 606, 623, 295 A.2d 676, 687 (1972); *Informed Consent, supra* note 30, at 1404; 75 HARV. L. REV. 1445 (1962).

46. *See Informed Consent, supra* note 30, at 1404.

Because each patient is different, his emotional and physical condition necessarily presents a unique array of factors and variables that might affect the appropriateness of a given treatment, the likelihood and potential damage of the risks, and the patient's physical and emotional reaction to each. Any disclosure decision would be unique to that patient and inapplicable to any other. It is extremely unlikely, therefore, that a specific standard governing disclosure in that situation would exist within the medical profession;[47] and expert testimony analyzing the physician's conformity to a professional standard would tend to be a subjective, individual appraisal of what the witness believes he would do in the same situation.[48] Moreover, even if a professional standard does exist, it is likely to be so vague that it would provide the medical community with a virtually absolute discretion to determine the scope of the disclosure.[49]

Second, the professional standard is potentially inconsistent with the patient's right to make the ultimate decision.[50] By vesting the medical profession with the virtually absolute discretion to decide whether disclosure is necessary and how much should be disclosed, the professional standard effectively subordinates the patient's informational needs to the very group upon whom is placed the obligation to inform.[51] The objectives of the

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47. *See* Comment, *A New Standard for Informed Consent in Medical Malpractice Cases — The Role of the Expert Witness*, 18 ST. LOUIS U.L.J. 256, 260 (1973); 75 HARV. L. REV. 1445 (1962).

48. Wilkinson v. Vesey, 110 R.I. 606, 623, 295 A.2d 676, 687 (1972); *Informed Consent, supra* note 30, at 1405–06. Although there may be some similarities between patients, it is doubtful that these similarities are sufficient to overcome the unique features presented by each individual. Each patient differs in terms of prior medical history and the degree of seriousness of his physical condition, either of which may affect the probability of the occurrence of the risk or the seriousness of the resulting harm. Each patient has a different set of personal preferences and circumstances that make him unique. Unless the physician improperly bases his disclosure decision solely on clinical data, such as whether the risk itself poses a serious danger or occurs frequently, he must take into account the particular circumstances presented by the individual. Moreover, courts adopting the professional standard evaluate disclosures with reference to the subjective, rather than objective, patient, *see* note 77 and accompanying text *infra*, which by negative inference suggests that they also assume that the individual presents a unique package of medical facts. This approach is buttressed by the professionals' demand for the discretionary latitude to judge the individual's medical condition, *see* Aiken v. Clary, 396 S.W.2d 668, 674 (Mo. 1965), and to withhold disclosure when therapeutically required. *See generally* Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *clarified in & rehearing denied*, 187 Kan. 186, 354 P.2d 670 (1960); Starnes v. Taylor, 272 N.C. 386, 158 S.E.2d 339 (1968); Watson v. Clutts, 262 N.C. 153, 136 S.E.2d 617 (1964); McCoid, *supra* note 22, at 426–34; Plante, *supra* note 29, at 651–56. *See also* note 35 *supra*.

49. *See* note 45 *supra*.

50. Cobbs v. Grant, 8 Cal. 3d 229, 243, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (1972); Sard v. Hardy, 281 Md. at 442–43, 379 A.2d at 1021.

51. *See* Canterbury v. Spence, 464 F.2d 772, 784 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). In a particularly caustic commentary, one author essentially argues that physicians, believing that only they know what is best for the patient, do not have any need or desire to communicate information to the patient. According to this

physician and patient do not necessarily coincide, and it is possible that the professional standard, if it does exist, would exclude information that would be relevant to the patient's decision.[52] Moreover, if motivated by an improper concern, such as the desire to protect against future liability or to induce consent to the treatment believed most desirable by the physician, the profession may develop a standard expressly designed to counterbalance the patient's right to know.[53] Because "the patient must suffer the consequences, and since he bears all the expense . . . , fundamental fairness requires that the patient be allowed to know what risks a proposed therapy entails"[54] without having his right to the information depend on the standard of the professional community. "To the physician, whose training enables a self-satisfying evaluation, the answer may seem clear, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie."[55] By focusing on the informational needs of the patient, the lay standard insures that information relevant to his decision will be made available.

Finally, deciding which information is to be disclosed is primarily a nonmedical decision. The physician's medical expertise is employed to determine which treatments are medically acceptable in the particular

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author, doctors generally desire absolute control over all phases of the treatment, believe that patients are too ignorant to understand a description of risks and complex scientific procedures, and therefore believe that the patient should not be informed about risks or alternative treatments. *See* Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship,* 79 YALE L.J. 1533, 1533-46 (1970). *See generally* Riskin, *supra* note 26, at 595-600. For a commentary arguing that the patient lacks ability to understand and evaluate such information and favoring the professional standard, see Karchmer, *Informed Consent: A Plaintiff's Medical Malpractice "Wonder Drug,"* 31 MO. L. REV. 29, 41-42 (1966).

Assuming that the medical community acts properly, there may in fact be no significant difference between the professional and lay standards. Unless disclosure of a risk would itself present a medical danger, *see* notes 126 to 138 and accompanying text *infra,* it is probable that the customs of the profession would, in fact, declare that a reasonable practitioner should disclose any information significant to the patient's decision. The danger is that a self-policing entity may not act with the proper goals in mind and might even establish a standard providing that no information should be disclosed.

52. In ordinary malpractice cases the objectives of doctor and patient coincide. Both want a cure if it can be had. In informed consent situations, however, their objectives may not coincide. In seeking a cure, a physician will normally choose the method of treatment that is most likely to accomplish the cure. He will weigh the importance of a risk against the advantages of the method chosen and may be willing to accept the risk if the method offers the best prospect of a cure. Although the patient also desires a cure, he may attach more importance to the risk. It is the patient who will suffer if a risk materializes and its potential consequences may be more than he is willing to accept, especially when the success of the treatment cannot be guaranteed. *See* 2 F. HARPER & F. JAMES, LAW OF TORTS 60-61 (Supp. 1968).

53. *See* Sard v. Hardy, 281 Md. at 447, 379 A.2d at 1024.

54. *Id.* at 443, 379 A.2d at 1022.

55. Canterbury v. Spence, 464 F.2d 772, 781 (D.C. Cir.) (footnote omitted), *cert. denied,* 409 U.S. 1064 (1972).

situation and to identify the risks associated with each.[56] Once this information is identified, however, the physician only has to decide which information to disclose.[57] The only criterion relevant to the doctor's disclosure decision is whether the information would influence the patient's decision; and whether information will be influential (and hence material) depends upon the patient's mental processes and must be assessed from that perspective. The physician does not have a greater ability to weigh the significance of the information than does the patient, and his expertise is not, therefore, necessary to this determination. Moreover, once a disclosure has been made, the patient is as qualified as the physician to weigh the potential risks against the benefit to be gained in light of the patient's own subjective fears, hopes, and preferences.[58] Therefore, except in certain specific situations,[59] the disclosure decision is essentially nonmedical and should not be based on a professional standard of care.[60]

Consistent with its recognition that the disclosure decision is essentially nonmedical, the *Sard* court held that expert testimony is not required to establish either the scope or breach of a physician's duty to disclose.[61] Courts employing the professional standard uniformly require that expert testimony establish the existence of and departure from a duty to disclose.[62]

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56. *See id.* at 791-92.

57. The physician is free, of course, to urge the patient to follow his recommendation in spite of the risk.

58. *See* Cobbs v. Grant, 8 Cal. 3d 229, 243, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (1972); Sard v. Hardy, 281 Md. at 443, 379 A.2d at 1021; 2 F. HARPER & F. JAMES, LAW OF TORTS 60-61 (Supp. 1968). The essence of this criticism of the professional standard is nicely stated by Harper and James:

> In ordinary malpractice cases the objectives of doctor and patient may be assumed to coincide. Both want the best results medical science can produce. Both want a cure if it can be had . . . . But no such assumption can safely be made on an issue of informed consent. The very foundation of the doctrine is every man's right to forego treatment or even cure if it entails what *for him* are intolerable consequences or risks, however warped or perverted his sense of values may be in the eyes of the medical profession or even of the community, so long as any distortion falls short of what the law regards as incompetency. Individual freedom here is guaranteed only if people are given the right to make choices which would generally be regarded as foolish ones. . . .
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> Since the patient's right to make his choice in the light of his own individual value judgments is the very essence of his freedom of choice, it should not be left entirely to the medical profession to determine what he should be told. The judgment to be made is not simply a medical judgment . . . .

Id. (emphasis in original).

59. *See* notes 126 to 138 and accompanying text *infra*.

60. *See* Canterbury v. Spence, 464 F.2d 772, 785 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Wilkinson v. Vesey, 110 R.I. 606, 624-25, 295 A.2d 676, 688 (1972).

61. 281 Md. at 446-47, 379 A.2d at 1023-24.

62. *See, e.g.*, Riedesser v. Nelson, 111 Ariz. 542, 545, 534 P.2d 1052, 1055 (1975); Casey v. Penn, 45 Ill. App. 3d 573, 584, 360 N.E.2d 93, 101 (1977); Aiken v. Clary, 396 S.W.2d 668, 675 (Mo. 1965); Bly v. Rhoads, 216 Va. 645, 650-51, 222 S.E.2d 783, 787-88 (1976).

The traditional justification for expert testimony is that the average person does not possess the knowledge and experience necessary to pass judgment on questions involving medical science or technique.[63] When, however, the establishment of the existence of or deviation from the appropriate standard of care does not depend on a specialized knowledge, expert testimony should not be required.[64] Further, elimination of this requirement also protects the plaintiff from a possible conspiracy of silence that could thwart his ability to secure an expert willing to testify[65] and frees the patient from "'an unwarranted abdication of responsibility and of the individual's right to make an informed choice, to the medical profession.' "[66]

The *Sard* court did not totally dispense with the need for expert testimony in informed consent cases. Expert testimony will still be necessary to establish those facts beyond the knowledge of the average person. An expert will be required to establish the nature and frequency of the occurrence of risks inherent in a particular treatment, the existence of accepted alternative treatments, and whether disclosure would have been detrimental to the patient.[67] In addition, the defendant is free to introduce expert testimony in his defense to establish that his disclosure complies with accepted medical practice. Although this testimony would not be binding on the jury, it would be evidence of whether the defendant had in fact failed to disclose a material risk or was justified in his failure to disclose.[68]

PRACTICAL APPLICATION

As a case of first impression, *Sard* articulates the basic framework of the standards governing the scope of the required disclosure. Thus, trial courts, physicians, and attorneys will encounter theoretical, definitional, and practical problems when application to divergent factual situations requires a filling in of the interstices within this framework. In resolving these issues, it must be remembered that the fundamental purpose of the doctrine is to provide significant information necessary for the patient to decide what

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63. *See* W. PROSSER, *supra* note 26, at 164.

64. *See* Canterbury v. Spence, 464 F.2d 772, 785, 791-92 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972).

65. Sard v. Hardy, 281 Md. at 443, 379 A.2d at 1022; Cooper v. Roberts, 220 Pa. Super. Ct. 260, 267, 286 A.2d 647, 650 (1971).

66. 281 Md. at 447, 379 A.2d at 1024 (quoting 2 F. HARPER & F. JAMES, LAW OF TORTS 60-61 (Supp. 1968)). The *Sard* court, however, expressly indicated that its holding would not change the rule in traditional malpractice cases based on a negligent performance. 281 Md. at 448 n.5, 379 A.2d at 1024 n.5.

67. 281 Md. at 447-48, 379 A.2d at 1024; Getchell v. Mansfield, 260 Or. 174, 489 P.2d 953 (1971). In the factual situation before the court in *Sard,* expert testimony would be required to establish the existence of the alternative methods of sterilization, that these methods were accepted as proper treatment by the medical profession, and the failure rates, inherent risks, and frequency of occurrence of each risk for each alternative method. 281 Md. at 448, 379 A.2d at 1024.

68. *See* 281 Md. at 445, 448, 379 A.2d at 1023, 1024.

shall be done with his body,[69] and any resolution should promote this purpose.

The Patient as the Reasonable Person

The *Sard* standard incorporates an objective standard of whether disclosure of information would be significant to the "reasonable person in the patient's position,"[70] rather than a subjective standard of whether it would have been significant to the actual patient. The adoption of an objective standard has been justified on two grounds. First, negligence law has traditionally been based on objective standards of conduct.[71] Second, the objective standard recognizes that it is the physician who must determine whether the information that he is aware of is sufficiently significant to require disclosure.[72] Because each patient possesses unique mental processes, desires, and idiosyncracies, the physician cannot realistically be expected to know exactly what information the patient would subjectively deem significant.[73] To protect the physician, the adequacy of the disclosure must be determined from the physician's perspective and not from the hindsight perspective of the patient.[74] Therefore, the physician should be expected to disclose only information that would be significant to the reasonable person in the patient's position.[75] Because of his medical training and the experience gained from treating a wide range of patients, the physician can reasonably be expected to develop a sense of what would be significant to the average, reasonable patient.[76]

The objective standard, however, is inconsistent with the premise that the individual patient has the right to determine his future course.[77] The individual, not the reasonable person in the patient's position, must make

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69. *See id.* at 439, 442-44, 379 A.2d at 1019, 1021-22.

70. *Id.* at 444, 379 A.2d at 1022.

71. *See generally* Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); W. PROSSER, *supra* note 26, at 149-51.

72. *See* Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); Waltz & Scheuneman, *supra* note 1, at 639-40.

73. *See* note 72 *supra.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *See* note 40 and accompanying text *supra. See generally* Seidelson, *Medical Malpractice: Informed Consent Cases in "Full-Disclosure" Jurisdictions,* 14 DUQ. L. REV. 309, 319 (1976); Comment, *supra* note 26, at 424-26. The lay standard's incorporation of the objective standard of disclosure is to some extent theoretically inconsistent. It is ironic that courts adopting the lay standard, which criticize the professional standard for withholding relevant information from the patient and presume that each patient is unique, *see* notes 44 to 60 and accompanying text *supra,* adopt an objective standard that will likely have the effect of withholding information relevant to the individual patient. It is especially ironic when it is recognized that the professional standard, which can be expected to be the most protective of the physician, bases the disclosure on the subjective patient. *See, e.g.,* Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *clarified in & rehearing denied,* 187 Kan. 186, 354 P.2d

the actual decision and bear the resulting consequences, and it is self-evident that information that is in fact significant to a particular individual could be withheld because it probably would not be significant to the "reasonable person." Therefore, even though some deference must be paid to the potential hardships imposed on the physician, the abstraction defined by the phrase "reasonable person in the patient's position" must incorporate more than the objective facts of the patient's medical condition. For example, the patient's occupation, hobbies, religious beliefs, and personal expectations of the benefits to be derived from the treatment are relevant. A potential risk of injury or disability to one hand probably would be more significant to a concert pianist or secretary than to a soccer player or attorney. Because an understanding of such circumstances is necessary to

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670 (1960); Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965); Watson v. Clutts, 262 N.C. 153, 159, 136 S.E.2d 617, 621 (1964); Seidelson, *supra* at 321.

The basic reason for using the objective test is that a physician cannot be expected to know the inner quirks of the patient's mental processes. This does not mean, however, that the physician cannot be expected to have some familiarity with the individual patient. He may have treated the patient previously and already know a great deal about the patient's "personality," and he can make inquiries of the patient at the time he discloses the information. Further, a requirement that the physician disclose information significant to the individual patient does not mean that he must disclose everything that a particular patient would find significant, regardless of how deviant he may be from the norm. As stated in Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972), the physician would be liable only if the disclosure were unreasonably inadequate. The jury can judge what the physician knew or reasonably should have known would be significant to the patient, and if the patient's assessment of the significance of the risk is such that the physician could not reasonably be expected to anticipate it, then disclosure would not be required.

In addition, the objective standard is usually applied only to the actor whose conduct causes the injury. Society expects that each person will act with reasonable caution to prevent harm to others and will not excuse the actor who claims that he was unaware of the danger because he was less perceptive or intelligent than the average member of society. *See* W. PROSSER, *supra* note 26, at 149–51. The conduct of the injured party is not considered unless that conduct in some way contributes to his own harm. In the disclosure environment, the patient is the passive recipient of the information. His personal ability to evaluate the disclosed information is not called into question; in fact, such a consideration would be irrelevant. *See* note 30 *supra*. By focusing on whether the hypothetical reasonable patient would deem the information significant, however, courts employing the objective standard confuse the issue by in effect inquiring whether the individual patient's evaluation of the significance of the information was reasonable. The appropriate inquiry is, instead, whether the physician's disclosure was reasonable. Because the physician in the first instance determines whether the information should be disclosed, it is only necessary to inquire whether the physician reasonably knew or should have known that the information would be significant to the individual patient. Moreover, even if the physician failed to disclose information, the patient must still establish that he would not have consented if he had been informed. *See* notes 139 to 147 and accompanying text *infra*. In this instance, the reasonableness of the patient's conduct should be called into question, and the causation requirement provides adequate protection to the physician.

an effective disclosure, the physician should be expected to make an initial inquiry to elicit such information.[78] In addition, the patient may also respond to the physician's initial disclosure with questions or statements implicitly expressing personal whims or preferences. These revelations may also indicate that information that the reasonable patient would regard as unimportant is highly significant to the actual patient. Therefore, the physician's disclosure decision must also incorporate any information about the patient's circumstances of which he is actually aware. The *Sard* court phrased the standard in terms of what the physician "knows or ought to know."[79] It is unclear whether this formulation simply repeats traditional negligence phraseology or, instead, actually anticipates an incorporation of the physician's inquiry and consideration of the subjective revelations suggested above. Nevertheless, the standard could and should be so interpreted in order to effect the purposes of the informed consent doctrine.

The Materiality of the Risk

Under the lay standard, the jury will, of course, ultimately determine whether information was sufficiently significant to require disclosure. The physician, however, is most interested in knowing in advance the criteria to be used in deciding whether the information is significant. Although the *Sard* court did not embellish its definition of materiality by discussing these

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78. *See* Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Waltz & Scheuneman, *supra* note 1, at 639–40. Although it may be argued that expecting such an inquiry undermines the traditional reliance on objective standards of conduct, the inquiry could be limited to those characteristics that form the background status of the patient. These characteristics would also be the same factors that any patient would be likely to use to decide whether to consent. The physician may already be aware of these characteristics, and further, precisely because he has the opportunity to inquire and knows that they will affect the patient's decision, it may be unreasonable in itself for the physician not to make such a limited inquiry.

79. 281 Md. at 444, 379 A.2d at 1022. It has been suggested that the physician is not obligated to disclose information that he believes would be significant to the individual patient but would not be significant to the reasonable patient. *See* 8 U. BALT. L. REV. 114, 118 n.21 (1978). This situation could arise when the physician, due to the existence of a long-term relationship with the patient, actually knows of a specific concern of his individual patient that is unreasonable and not held by the reasonable person. *See id.* The soundness of this suggestion is open to question. The purpose of employing the objective standard of "significant to the reasonable person in the patient's position" is to protect the physician from having to identify and predict accurately the personal, individualized concerns and whims of the actual patient. *See* notes 70 to 76 and accompanying text *supra*. If the physician actually knows of a personal concern or quirk of the patient, the purpose behind the use of the objective standard is no longer present, at least with respect to that specific, known concern, and there is no further reason to apply the objective standard. Thus, whenever the physician actually knows of an individual, unreasonable concern of the actual patient, he should be obligated to disclose information that he knows would be significant to that patient due to that specific concern.

criteria, some indication may be gained from commentaries and existing case law.[80]

First, it must be recognized that although materiality is most often discussed in terms of a specific risk, a physician's obligation to disclose is not limited only to risk information. Second, the materiality standard defines only the scope of the disclosure rather than the subject matter that must be disclosed. One commentator has suggested the following formulation of subject matter that must be disclosed: the diagnosis; the nature, duration, and purpose of the treatment; the method and means by which it is to be administered; alternative forms of therapy; the risks and hazards involved in the treatment and each alternative, including temporary and permanent after and side effects; expected beneficial effects; and the prognosis if the patient forgoes any treatment.[81] Within each subject area, the physician must disclose any item of information material to the patient's decision.[82]

The *Sard* standard is not limited to particular types of treatment. The disclosure requirement is applicable to therapies ranging from office treatments for a common cold, prescriptions,[83] and injections, to diagnostic tests[84] and complex surgical procedures. The critical factor is the materiality of the information rather than the type of treatment. The physician must therefore divide each treatment into its separate phase or phases and disclose any material information for each phase included in the subject areas previously enumerated.[85] A similar process will be required for each alternative treatment.

Although it imposed a duty to disclose alternative methods of treatment, the *Sard* court did not discuss whether the physician must disclose only

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80. Citation will hereinafter also be made to cases from jurisdictions that have adopted the professional standard whenever their discussion is relevant and illuminating in delineating factors that may indicate that information would or would not be significant. It must be remembered, however, that because the ultimate decision of whether the information should be disclosed is actually determined according to the customs of the profession, any discussion by the courts in these cases of the reasons that a specific item of information should or should not be disclosed is technically dicta.

81. *See* Note, *Informed Consent — A Proposed Standard for Medical Disclosure*, 48 N.Y.U. L. REV. 548, 559 (1973) (citing 21 C.F.R. § 130.37 (1972)).

82. *See* Note, *supra* note 81, at 559. Although this catalogue of subjects does not reveal what particular information must be disclosed, it does provide an organizational checklist of the general areas that the physician should analyze to be relatively sure he will discover and disclose all significant information.

83. *See* Hamilton v. Hardy, 549 P.2d 1099 (Colo. App. 1976) (failure to advise of dangerous effects of oral contraceptive); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967) (professional standard; prescription of chloromycetin). It is possible, however, that such procedures may be considered common procedures in which the risk involved is relatively remote and commonly known to have a very low incidence and that no disclosure would be required. *See* text accompanying note 114 *infra*.

84. *See* Zeleznick v. Jewish Chronic Disease Hosp., 47 A.D.2d 199, 366 N.Y.S.2d 163 (1975) (angiogram).

85. *See* note 81 and accompanying text *supra*.

those alternatives that he would personally employ or whether he must also disclose any recognized method of treatment. In malpractice actions, a physician's conduct in diagnosing and selecting a method of treatment is judged according to the principles of the school of medicine to which he belongs.[86] As long as the method of treatment is recognized as appropriate by that school, he will not be held liable even if another school of medicine believes that the method selected was improper or that a different method was more appropriate. Although a physician should not be required to disclose an alternative method unless there is a respected school of opinion recognizing that method as medically proper,[87] a physician should not be able to withhold disclosure of any recognized alternative merely because he does not agree with the school of medicine recognizing that method.[88] A patient should have the opportunity to consider any recognized treatment or to consult with a physician willing to perform the type of treatment that the patient prefers. A physician may refuse to perform a treatment that he believes to be unsound, but the information comprising the basis for the patient's consent should not be restricted by the physician's personal beliefs. Therefore, the physician should be required to disclose any alternative method of treatment that is recognized as medically acceptable by some reputable school of medical opinion.

A possible ambiguity of the *Sard* standard stems from the fact that, in determining whether a risk is material, the standard might be interpreted as focusing narrowly on the materiality of a specific, single risk rather than on the totality of the hazards presented by the prospective treatment. The standard defines a "material risk [as] *one* which a physician knows or ought to know would be significant to a reasonable person in the patient's position in deciding whether or not to submit to a particular medical treatment or procedure."[89] In determining whether a specific risk should be disclosed, the standard as it is defined could permit a physician to consider only whether

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86. *See* W. PROSSER, *supra* note 26, at 163.

87. *See generally* Holland v. Sisters of St. Joseph of Peace, 270 Or. 129, 522 P.2d 208, *opinion withdrawn on other grounds*, 270 Or. 129, 140, 526 P.2d 577 (1974), *noted in* 1974 UTAH L. REV. 851; Getchell v. Mansfield, 260 Or. 174, 489 P.2d 953 (1971).

88. *See generally* Holland v. Sisters of St. Joseph of Peace, 270 Or. 129, 522 P.2d 208, *opinion withdrawn on other grounds*, 270 Or. 129, 140, 526 P.2d 577 (1974); Archer v. Galbraith, 18 Wash. App. 369, 567 P.2d 1155 (1977).

As a contemporary example, if laetrile were recognized today by some respected school within the profession as an acceptable form of treatment, the physician would be required at least to inform the patient that the treatment existed. This result would be consistent with the *Sard* court's rejection of the professional standard. Under the professional standard, an expert presumably could not testify that the physician should have disclosed an alternative treatment if the school to which the physician belonged did not agree it was medically proper. Further, one reason why the *Sard* court rejected the professional standard was that the discretion to withhold information was inconsistent with the right of the patient to make the final choice. *See* 281 Md. at 443, 379 A.2d at 1021. *See also* Note, *The Abortion Alternative and the Patient's Right to Know*, 1978 WASH. U.L.Q. 167.

89. 281 Md. at 444, 379 A.2d at 1022 (emphasis added).

knowledge of the specific risk itself would be significant. If the standard does permit an isolated and separate consideration of each identifiable risk or alternative, it clearly does not fully account for the dynamics of the patient's decision. Considered in isolation, a single risk might not pose a substantial danger and would thus be insignificant, and a given treatment may include several inherent risks each of which may be significant or insignificant when considered by itself. The sum total of all of the hazards inherent in a treatment, however, may indicate that a substantial degree of danger may be involved. The incremental increase in danger posed by a single risk, though insignificant when considered alone, may become significant when considered in conjunction with the other risks.[90] Thus, in order that each of these factors may be properly considered, the materiality standard should be modified as follows: a material risk is one that the physician, knowing what he knows or should know about the circumstances and condition of the patient, knows or should know would be significant, either singly or in combination with other risks, to the reasonable person in the patient's position to decide whether to submit to a particular procedure.

Unfortunately, with respect to any specific item of information, "there is no bright line separating the significant from the insignificant . . . ."[91] Nevertheless, the following factors, considered by both professional and lay standard courts, offer some initial guidance in determining whether a risk is material and requires disclosure.[92] One commonly advanced test balances

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90. *See generally* Waltz & Scheuneman, *supra* note 1, at 639–40.

91. Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972).

92. For collections of cases describing risks which do or do not have to be disclosed, see D. HARNEY, *supra* note 8, § 2.4; D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶¶ 22.05 to .06 (1977). The cases, however, are organized by the type of risk and the authors do not distinguish between disclosures compelled by the professional and those compelled by the materiality standard. The following courts applying the materiality standard have held that the following risks presented jury issues of materiality: Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.) (one-percent chance of paralysis from laminectomy), *cert. denied,* 409 U.S. 1064 (1972); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (five-percent chance of injury to spleen, requiring its removal, in surgery for duodenal ulcer; additional risk of gastric ulcer); Zeleznick v. Jewish Chronic Disease Hosp., 47 A.D.2d 199, 366 N.Y.S.2d 163 (1975) (circulation loss from angiogram resulting in amputation of two fingers and debilitated and deformed hand); Holland v. Sisters of St. Joseph of Peace, 270 Or. 129, 522 P.2d 208 (excessive radiation), *opinion withdrawn on other grounds,* 270 Or. 129, 140, 526 P.2d 577 (1974); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972) (excessive radiation); Small v. Gifford Memorial Hosp., 133 Vt. 552, 349 A.2d 703 (1975) (hepatitis from anesthesia); Miller v. Kennedy, 11 Wash. App. 272, 522 P.2d 852 (1974) (loss of kidney from kidney biopsy), *aff'd per curiam,* 85 Wash. 2d 151, 530 P.2d 334 (1975); Hunter v. Brown, 4 Wash. App. 899, 484 P.2d 1162 (1971) (50% chance of increasing dark skin pigmentation from dermabrasion), *aff'd,* 81 Wash. 2d 465, 502 P.2d 1194 (1972); Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 2d 1, 227 N.W.2d 647 (1975) (risk of paralysis from aortogram). *Compare* Cooper v. Roberts, 220 Pa. Super. Ct. 260, 286 A.2d 647 (1971) (1/250 chance of stomach perforation during

the seriousness of the risk against the frequency of its occurrence.[93] Thus, a low probability of death or serious disablement or a high probability of minor harm might be material.[94] Similarly a very high probability of a very minor risk[95] or an extremely low probability of a very serious risk might be immaterial.[96] In general, the most important factor should probably be the seriousness of the risk.[97] For example, unless the probability of its occurrence is extremely remote, any risk involving death, the loss of an organ or limb, or serious disablement should *per se* require disclosure. The nature of these risks is so severe that the patient, not the physician, should

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gastroscopic examination is material) *with* Longmire v. Hoey, 512 S.W.2d 307 (Tenn. App. 1974) (one-percent chance of perforation of ureter during hysterectomy is immaterial).

93. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *cf.* Getchell v. Mansfield, 260 Or. 174, 180, 489 P.2d 953, 956 (1971) (disclosure required for results that might well occur and not those that are extremely remote; risks that are of serious consequence but not those that are unexpected and of little consequence).

94. *See* Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Wilkinson v. Vesey, 110 R.I. 606, 625, 295 A.2d 676, 689 (1972). *Compare* Bowers v. Talmage, 159 So. 2d 888 (Fla. App. 1963) (professional standard; disclosure required for three-percent chance of death, paralysis, or other serious injury) *and* Scott v. Wilson, 396 S.W.2d 532 (Tex. Civ. App. 1965) (disclosure required for one-percent chance of loss of hearing), *aff'd*, 412 S.W.2d 299 (Tex. 1967) *with* Ross v. Hodge, 234 So. 2d 905 (Miss. 1970) (professional standard; paralysis but no disclosure required on theory that all reasonable people must understand surgery involves some risk) *and* Yeates v. Harms, 193 Kan. 320, 393 P.2d 982 (1964), *on rehearing*, 194 Kan. 675, 401 P.2d 659 (1965) (professional standard; 1.5% chance of loss of eye does not require disclosure). *See generally* Beloud, *The Growing Importance of Informed Consent*, 8 LINCOLN L. REV. 115, 118 (1973).

95. *See* Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir.) (disclosure of risk of infection not required), *cert. denied*, 409 U.S. 1064 (1972); Roberts v. Young, 369 Mich. 133, 119 N.W.2d 677 (1963) (disclosure of risk of infection not required).

The courts are divided when the risk involved is a moderately serious injury which is reparable by a second operation. *Compare* Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (risk in operation for duodenal ulcer possibly causing injury to spleen and development of gastric ulcer is material) *and* Cooper v. Roberts, 220 Pa. Super. Ct. 260, 286 A.2d 647 (1971) (1/250 risk of perforation of stomach is material) *with* Starnes v. Taylor, 272 N.C. 386, 158 S.E.2d 339 (1968) (professional standard; no disclosure for 1/250 to 1/500 chance of perforation of esophagus) *and* Longmire v. Hoey, 512 S.W.2d 307 (Tenn. App. 1974) (no disclosure of one-percent chance of perforation of ureter).

96. *Cf.* Stottlemire v. Cawood, 213 F. Supp. 897 (D.D.C.), *new trial denied*, 215 F. Supp. 266 (1963) (no duty of drug company to warn of 1 in 800,000 chance of aplastic anemia from drug when drug available only by prescription).

97. *See* Longmire v. Hoey, 512 S.W.2d 307, 310 (Tenn. App. 1974). Some courts employing the professional standard have indicated that they might require disclosure as a matter of law and without expert testimony to establish a duty to disclose when the risk is extremely serious or the treatment is novel or extremely hazardous. *See, e.g.*, Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *clarified in & rehearing denied*, 187 Kan. 186, 354 P.2d 670 (1960); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967).

decide whether the potential disability outweighs the potential benefit to be gained, and disclosure is a prerequisite to this decision.

The seriousness of the condition for which the patient is seeking treatment may be an additional factor to be considered. If the condition is relatively minor or may be left untreated without serious medical consequences, even relatively minor risks may be material.[98] Because the relative benefit to be gained may not outweigh the risk, the patient would want to consider the risk before undergoing the treatment. Conversely, however, the fact that some treatment is medically necessary to save the patient's life should not be permitted to lessen the disclosure requirements. The nature of the risk may be such that the patient would rather face certain death than endure the balance of his life with a seriously disabling injury; or he may prefer to choose an alternative that offers a decreased possibility of success but also offers a diminished possibility of risk.[99] Another factor is the availability of alternative methods.[100] If only one acceptable method exists to provide a cure, relatively minor or moderate risks may not be material. It would be unlikely that a patient with a serious or moderately serious condition would find such a risk significant when only one method of treatment is available. If the condition to be cured is relatively minor, however, these risks may nevertheless be material. Because the benefit to be gained by a cure is small, less significant risks would increase in significance.[101] When other methods are available, however, an otherwise immaterial risk may be material, whether the condition is serious or minor and especially if the alternative does not include that particular risk. Alternative methods may offer a different package of risks and consequences necessitating a more detailed disclosure to permit the patient to evaluate the various types and combinations of risks.

Although these factors should be considered, any decision to disclose must also recognize that it is the patient who ultimately weighs the risks against the benefits. A close decision should therefore be resolved in favor of

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98. For cases possibly providing examples of this proposition, see Zeleznick v. Jewish Chronic Disease Hosp., 47 A.D.2d 199, 366 N.Y.S.2d 163 (1975) (risk of circulation loss causing amputation of two fingers, deformed and debilitated right hand as a result of diagnostic test to find reason for neurological deficit on left side of body; plaintiff testified that condition was not serious enough for him to have taken risk); Hunter v. Brown, 4 Wash. App. 899, 484 P.2d 1162 (1971) (risk of increasing spotted skin condition from dermabrasion treatment), *aff'd*, 81 Wash. 2d 465, 502 P.2d 1194 (1972). Significantly, the professional standard fails to recognize that the risks may outweigh any expected benefit to be gained from essentially elective surgery. For a case providing a possible example of this proposition, see Butler v. Berkeley, 25 N.C. App. 325, 213 S.E.2d 571 (1975) (risk of infection in plastic surgery resulting in similar condition for which cure originally sought).

99. *See* Holland v. Sisters of St. Joseph of Peace, 270 Or. 129, 522 P.2d 208, *opinion withdrawn on other grounds*, 270 Or. 129, 140, 526 P.2d 577 (1974); ZeBarth v. Swedish Hosp. Medical Center, 81 Wash. 2d 12, 31, 499 P.2d 1, 12 (1972), *noted in* 48 WASH. L. REV. 697 (1973).

100. *See generally* note 99 *supra*.

101. *See* note 98 and accompanying text *supra*.

disclosure. Such a resolution will best promote and protect the patient's right of self-determination. This principle is implicit in *Sard*'s ruling that a two-percent risk of failure was sufficient to permit the jury to determine whether it would be material to a patient desiring to prevent future pregnancies due to her financial condition and the possibility of damage to her health.[102] Similarly, the failure to advise Mrs. Sard that the sterilization could be performed at a time other than during the Caesarean delivery, and with a decreased chance of failure, was sufficient to permit the jury to decide whether the physician withheld material information about alternative treatments.[103]

Limitations on Disclosure

Proponents of the professional standard contend that whether information should be disclosed is a matter of professional judgment and a physician must be permitted the discretion to withhold disclosure when he determines that it would be in the best medical interests of the patient.[104] They argue that the physician must consider the state of the patient's physical and mental health and whether the inherent risks materialize frequently or infrequently.[105] The principal contention is that a physician's primary duty is to do what is best for the patient and that this must outweigh the duty to disclose.[106] Therefore, according to the proponents of

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102. 281 Md. at 445-46, 379 A.2d at 1023. Interestingly, in discussing the warranty claim, the court noted that Dr. Hardy's affirmative assurance that Mrs. Sard would not have more children, although not rising above the level of a therapeutic assurance, was relevant to the informed consent claim. *See id.* at 453-54, 379 A.2d at 1027. Apparently, the court meant that this assurance, combined with the failure to disclose that the operation might not be successful, falsely exaggerated the probability of success and may have induced her consent. This suggests the possibility that physicians might employ therapeutic assurances to mitigate the potential apprehension that patients may develop as a result of the disclosure that the physician is now obligated to make. Therefore, the next issue that may arise in informed consent cases is whether, although the physician disclosed the risk, his tone of voice or use of therapeutic reassurances misled the patient by implying that the risk was really minimal or insignificant.

103. *Id.* at 446, 379 A.2d at 1023.

104. *See, e.g.,* Natanson v. Kline, 186 Kan. 393, 406, 350 P.2d 1093, 1103, *clarified in & rehearing denied,* 187 Kan. 186, 354 P.2d 670 (1960); Starnes v. Taylor, 272 N.C. 386, 393, 158 S.E.2d 339, 344 (1968). *See generally* Lund, *The Doctor, The Patient, and the Truth,* 19 TENN. L. REV. 344 (1946); Oppenheim, *Informed Consent to Medical Treatment,* 11 CLEV.-MAR. L. REV. 249, 251 (1962) (disclosure may discourage patient from consenting to needed treatment that has minimal risk). *See also* Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957), *quoted in* note 35 *supra.*

105. *See, e.g.,* Grosjean v. Spencer, 258 Iowa 685, 140 N.W.2d 139 (1966); Aiken v. Clary, 396 S.W.2d 668, 674 (Mo. 1965).

106. *See* Starnes v. Taylor, 272 N.C. 386, 393, 158 S.E.2d 339, 344 (1968); Watson v. Clutts, 262 N.C. 153, 159, 136 S.E.2d 617, 621 (1964); 109 U. PA. L. REV. 768, 772-73 (1961). The *Watson* court rather glibly placed the burden on the patient to inform herself when it noted that the patient could have withdrawn her consent and then

the professional standard, the physician must have the flexibility to withhold disclosure of risks, without the fear of a lawsuit, whenever the disclosure would increase the patient's fear and apprehension and thereby decrease the probability of a successful treatment, as well as when the disclosure would itself cause psychological and physical harm.[107] It is also argued that the lay standard may demand too much of the physician's time and may lead to a proliferation of malpractice actions, possibly inducing the physician to practice defensive medicine.[108]

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made a simple request to the surgeon to disclose the possible adverse consequences. The physician informed her only that the thyroidectomy was serious and not done without risk, but did not inform her that one of the risks was partial or total paralysis of the vocal chords. 262 N.C. at 159, 136 S.E.2d at 621.

107. *See, e.g.,* Aiken v. Clary, 396 S.W.2d 668, 674 (Mo. 1965); Butler v. Berkeley, 25 N.C. App. 325, 342-43, 213 S.E.2d 571, 581-82 (1975). As stated in Roberts v. Wood, 206 F. Supp. 579, 583 (S.D. Ala. 1962),

> [d]octors frequently tailor the extent of their pre-operative warnings to the particular patient, and with this I can find no fault. Not only is much of the risk of a technical nature beyond the patient's understanding, but the anxiety, apprehension, and fear generated by a full disclosure thereof may have a very detrimental effect on some patients.

See also Butler v. Berkeley, 25 N.C. App. 325, 338, 213 S.E.2d 571, 579 (1975) (physician stated that he couldn't explain everything because he would never get work done); Hunter v. Brown, 4 Wash. App. 899, 902, 484 P.2d 1162, 1164 (1971) (physician stated that the patient would walk right out of the office if told there was any danger), *aff'd,* 81 Wash. 2d 465, 502 P.2d 1194 (1972).

108. *See* Butler v. Berkeley, 25 N.C. App. 325, 342-43, 213 S.E.2d 571, 581-82 (1975); Bly v. Rhoads, 216 Va. 645, 650, 222 S.E.2d 783, 787 (1976). *See also* Karchmer, *supra* note 51, at 41-42. For a definition of defensive medicine, see ZeBarth v. Swedish Hosp. Medical Center, 81 Wash. 2d 12, 499 P.2d 1 (1972) (physician interested in protecting himself from an overburden of law suits and attendant costs on time and purse might follow the most conservative therapy — which while of doubtful benefit to the patient, exposes the patient to no affirmative medical hazards and the doctor to no risk of litigation); Project, *The Medical Malpractice Threat: A Study of Defensive Medicine,* 1971 DUKE L.J. 939.

Although it is uncertain that the lay standard will result in a greater number of malpractice claims, or recoveries thereon, than a professional standard of disclosure, even an unfounded perception by physicians that this might occur could result in the practice of defensive medicine. Nevertheless, physicians should not necessarily believe that malpractice claims would increase. Most suits raising informed consent claims, even in jurisdictions employing a professional standard of disclosure, also allege, as in *Sard, see* note 4 *supra,* that the injury was caused by a negligently performed treatment. *See, e.g.,* Roberts v. Young, 369 Mich. 133, 119 N.W.2d 627 (1963); Starnes v. Taylor, 272 N.C. 386, 158 S.E.2d 339 (1968). This may suggest that a suit of some type will be brought whenever the patient believes that the injury is attributable to some wrong committed by the physician and that an informed consent claim will only be an alternative cause of action. Thus, whether an informed consent claim is brought at all may not be related to the standard of disclosure. Although the lay standard may offer a greater potential for a successful recovery than the professional standard, it can do so only when the lay standard requires a different disclosure than the professional standard. Whether instances of

Implicitly responding to these claims, the *Sard* court, in dicta, amplified its definition of the scope of disclosure by stating several important qualifications and limitations. The court reemphasized that not all risks were to be divulged — only those that are material to the intelligent decision of a reasonably prudent patient[109] — and then enuniciated several specific limitations on the disclosure requirement. First, the physician does not have to disclose material information when the patient has specifically requested that he not be informed.[110] Second, a polysyllabic, mini-course in medical science is not required.[111] A highly technical description of the procedure rivalling a classroom lecture in medical science is unnecessary to inform the decision. All that is required is a lay description of the possible treatments, the benefits and consequences of each, the potential risks of death or bodily harm, the frequency of occurrence, and the expected effect should a risk materialize. Third, a physician is not liable for failing to disclose a risk of which he is unaware and should not have been aware.[112]

The *Sard* court did not expressly describe the procedural effect to be given any of the limitations it listed. It is traditional law that the plaintiff

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different disclosure requirements will actually be sufficiently numerous to produce a significant increase cannot be determined.

Physicians should also recognize that the potentially broader disclosure mandated by the lay standard might lead to a reduction in malpractice suits. Some commentators have suggested that informed consent suits may be brought partially in anger, to retaliate for the surprise occurrence of an undisclosed and unanticipated collateral result. *See, e.g.*, McCoid, *supra* note 22, at 426–27; *Informed Consent, supra* note 30, at 1418. A case in which the physician explained that there was a "certain per cent" of risk that a diagnostic angiogram would worsen the numbness the patient felt on his *left* side may be illustrative. The patient alleged that no disclosure of any other risk of injury was made. Although competently performed, the patient suffered a serious debilitation and amputation of two fingers of his *right* hand after twenty-three subsequent operations failed to correct the circulatory loss induced by the angiogram. The condition originally being treated healed without further treatment. Zeleznick v. Jewish Chronic Disease Hosp., 47 A.D.2d 199, 366 N.Y.S.2d 163 (1975). Because the lay standard forces the physician to make some initial disclosure and should promote a fuller disclosure of risk information, the trust and confidence of the patient in the physician may be strengthened. The patient will anticipate the result if it occurs and should understand that the result is not attributable to the physician's conduct. An increased dialogue, therefore, may decrease the likelihood of suits.

109. 281 Md. at 444, 379 A.2d at 1022.

110. *Id.* at 445, 379 A.2d at 1022.

111. *Id.* (citing Cobbs v. Grant, 8 Cal. 3d 229, 244, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972)). Most commentators, even those agreeing with the professional standard, believe that sufficient information may be disclosed by speaking plainly and simply in a layman's language. *See* Natanson v. Kline, 186 Kan. 393, 410, 350 P.2d 1093, 1106, *clarified in rehearing denied*, 187 Kan. 186, 354 P.2d 670 (1960); McCoid, *supra* note 22, at 426–27; Plante, *supra* note 29, at 651.

112. 281 Md. at 445, 379 A.2d at 1022–23; *see* Meeks v. Marx, 15 Wash. App. 571, 550 P.2d 1158 (1976); Trogun v. Fruchtman, 58 Wis. 2d 596, 207 N.W.2d 297 (1973). In such a situation, the issue is whether the physician negligently failed to exercise the standard of care of his profession to know of the risk. *See* Waltz & Scheuneman, *supra* note 1, at 631. *See generally* Hamilton v. Hardy, 549 P.2d 1099 (Colo. App. 1976).

has the burden of going forward with evidence tending to establish the essential elements of his cause of action as well as the ultimate burden of proof and persuasion.[113] Each of the above limitations in effect classifies a specific type of information as immaterial, and establishing the materiality of the information is an essential element of the patient's case. Therefore, it appears that the plaintiff should have the burden of proving that the alleged undisclosed risk does not fall within these limitations.

Fourth, the *Sard* court also declared that disclosure is not required when the risk is either known to the patient or is so obvious as to justify a presumption of such knowledge, and fifth, the physician is not obligated to disclose relatively remote risks inherent in common procedures when it is common knowledge that those risks have a very low incidence.[114] Because the significance of the information is assessed in reference to a reasonable person,[115] the individual patient is, in effect, charged with the knowledge and awareness possessed by the average member of the community. Thus, the physician should not have to disclose information that is generally known within the community or obvious to a person of average intelligence. Similarly, there are many procedures — for example, treatment for a common cold — that are commonly encountered by the average member of the community. Risks of very low incidence may be inherent in these procedures, but because these infrequent risks are encountered often by the average member of the community, the average person would know that the risk occurs infrequently. Therefore, there is little reason to place a potentially onerous burden on the physician to disclose these risks every time he undertakes such a common procedure. These two limitations affect the causation element of the patient's case. If the average patient knew or should have known of the risk, he surely cannot allege that the physician's nondisclosure induced him to consent or that he would not have consented if he had been informed. Thus, as stated above, because each limitation affects an element of the patient's cause of action, the patient should have the

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113. Canterbury v. Spence, 464 F.2d 772, 791 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); 9 J. WIGMORE, EVIDENCE § 2485 (3d ed. 1940).

114. 281 Md. at 445, 379 A.2d at 1022; *see* Wilkinson v. Vesey, 110 R.I. 606, 627, 295 A.2d 676, 689 (1972).

115. *See* note 43 and accompanying text *supra.* For a more complete discussion of the reasons that the "reasonable person" standard is used, see notes 70 to 79 and accompanying text *supra.*

These two limitations may have also indirectly imported contributory negligence concepts into the informed consent doctrine. Without expressly inquiring whether the patient contributed to his own injury by failing to be aware of a risk commonly known by the average member of the community, or by choosing to undergo a treatment that included a risk of which he should have been aware, the limitations, by removing any obligation to disclose risks that should be known to the average person, in effect make the patient's conduct an issue. Once the jury finds that a risk is one that should be known by the average member of the community, it has effectively found that the patient's conduct failed to conform to the standard required for his own protection.

burden to prove that the undisclosed risk does not fall within either of these limitations.[116]

The general purpose of the fourth and fifth limitations is to permit the physician to assume, rather than be forced to guess, that the actual patient in fact possesses the awareness of the average member of the community. Although laudable in purpose, adoption of these limitations poses the danger that courts may too readily make an agnostic assumption that a particular risk is so obvious or commonly known that disclosure is not required as a matter of law.[117] Under similarly formulated limitations, some courts have declared that the risk of infection,[118] an allergic reaction to antibiotics,[119] and risks inherent in taking a blood sample[120] do not require

116. *See* Canterbury v. Spence, 464 F.2d 772, 791 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); *Informed Consent, supra* note 30, at 1407 n.69. *But see* Hunter v. Brown, 4 Wash. App. 899, 905, 484 P.2d 1162, 1166-67 (1971), *aff'd,* 81 Wash. 2d 465, 502 P.2d 1194 (1972).

Alternatively, it could be argued that because the disclosure decision rests in the first instance with the physician, it is he who will act on the belief that the risk is commonly known to the average person. Therefore, the physician withholding disclosure should have the burden of proof that the risk was in fact generally known. The problem with this argument is that, because the limitation affects elements of the plaintiff's case, *see* note 113 and accompanying text *supra,* it would reverse the traditional burdens of proof placed on litigants. Moreover, if it is accepted that the burden should be placed on the physician merely because he must make the disclosure decision, then the same reasoning would indicate that the patient would only have to prove that the risk was not disclosed, and the physician would have the burden of proving that the risk was immaterial.

117. For cases that may provide examples of courts too readily assuming that the patient should have been aware of the risk, see Shetter v. Rochelle, 2 Ariz. App. 358, 409 P.2d 74 (1965)*; modified on other grounds,* 2 Ariz. App. 607, 411 P.2d 45 (1966) (professional standard; five-percent risk of hemorrhaging in operation to remove cataract resulting in reduced vision in one eye; all reasonable people must understand that there is some risk inherent in surgery); Ross v. Hodge, 234 So. 2d 905, 909 (Miss. 1970) (professional standard; paralysis from removal of scalp tumor; all people must understand there is some risk in surgery); Butler v. Berkeley, 25 N.C. App. 325, 213 S.E.2d 571 (1975) (professional standard; infection resulting in death of bones forming eye socket; risk of infection is known to any person of ordinary sophistication). In *Butler,* the court relied on the fact that the plaintiff had attended college and that his father was an attorney in determining that the plaintiff should have been aware of the risk of infection. *Id.* at 342, 213 S.E.2d at 582. The error of these decisions is that even if the patient had known that there was some risk involved in any surgery, he would not necessarily have known the particular risk or its particular consequences, and therefore could not intelligently decide whether to consent. These cases implicitly suggest that the patient has the burden of uncovering the information he considers necessary. Such a result was in fact suggested in Watson v. Clutts, 262 N.C. 153, 160, 136 S.E.2d 617, 621 (1964).

118. *See, e.g.,* Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); *Informed Consent, supra* note 30, at 1407 n.69. *See also* Roberts v. Young, 369 Mich. 133, 119 N.W.2d 627 (1963).

119. *See* Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972). The *Cobbs* court stated that the physician must only make inquiries sufficient to determine whether the treatment is contraindicated by prior allergic reactions. *Id.*

120. *Id.* at 245 n.2, 502 P.2d at 11 n.2, 104 Cal. Rptr. at 515 n.2. For examples of other risks within this limitation, see Mitchell v. Robinson, 334 S.W.2d 11, 18 (Mo.

disclosure. Although most people may be, or should be, aware of the risks of infection and allergic reaction to antibiotics, it is doubtful that they are aware of other complications that may result from such risks. It is even more doubtful that the average person would know that the risks inherent in taking a blood sample include hematoma, dermatitis, septicimea, endocarditis, thrombophlebitis, pulmonary embolism, and death.[121] Unless a court is willing to declare that such risks, even if otherwise material, do not require disclosure as a matter of law, a very narrow scope must be given to the limitation if the purpose of the doctrine is to be accomplished. Two qualifications are necessary. First, no risk that is otherwise material should be excluded from disclosure by these limitations. Although undercutting the rationale of the limitations to some degree, this suggested qualification would guard against any tendency to assume that the average knowledge of the community is greater than it actually is. Information that would normally be considered significant should be disclosed as a matter of course, even if it is believed that the average patient is already aware of it. Qualifying the limitations in this manner, however, would not endanger the physician who failed to disclose. He would still be protected by the causation requirement — the patient would still have to prove that the reasonable person would not have consented if the information had been disclosed, which would be difficult if the information was in fact known to the average member of the community.[122] Moreover, this qualification further protects against the inconsistency between the objective standard and the fact that it is the individual patient who must actually decide whether to undergo a proposed treatment.[123] Second, the exemption provided by the limitations should be restricted to the specific risk believed to be commonly known. Disclosure should still be required if materialization of the risk could have an additional adverse consequence that would be material.[124] Even if the patient knew of the initial risk, he may not have known or be expected to

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1960) (hazards attendant to simple operations such as danger of tetanus, infection, or death under anesthesia), *overruled on other grounds,* Aiken v. Clary, 396 S.W.2d 668, 675 & n.6 (Mo. 1965); Platta v. Flatley, 68 Wis. 2d 47, 227 N.W.2d 898 (1975) (average patient should be aware of risks that he might need painkillers after foot surgery and be unable to continue in occupation requiring walking); Note, *supra* note 81, at 551 (risk of death after heart transplant). *But see* note 83 and accompanying text *supra.*

121. *See* Cobbs v. Grant, 8 Cal. 3d 229, 245 n.2, 502 P.2d 1, 11 n.2, 104 Cal. Rptr. 505, 515 n.2 (1972).

122. *See* text accompanying notes 115 & 116 *supra.*

123. For a more detailed discussion of this inconsistency, see note 77 and accompanying text *supra.*

124. For example, most people aware of the risk of infection might reasonably assume any harm would be limited to inflamation, fever, and some moderate discomfort. Although nondisclosure of these minor results would be reasonable, the physician should not also be permitted to withhold disclosure of the fact that an infection can also cause other serious injuries. *See, e.g.,* Butler v. Berkely, 25 N.C. App. 325, 213 S.E.2d 571 (1975) (infection caused the death of bones forming the eye socket resulting in a pulling down of the eyelid). *See also* text accompanying note 90 *supra.*

have known of the additional risks. This qualification would protect against the possibility that the physician would not disclose additional risks simply because they are caused by a risk that he assumes the patient should have known. That these limitations should be narrowly applied is suggested by the *Sard* opinion. The average person should be aware that there is an inherent risk of failure in any treatment. The *Sard* court held in part, however, that there was sufficient evidence for the jury to find that the projected possibility of failure in a tubal-ligation was a material risk that should have been disclosed.[125] The court did not consider whether Mrs. Sard or the average member of the community should have been aware of the risk of failure. Future decisions will determine whether this limitation will continue to be so narrowly construed.

Sixth, *Sard* also recognized a qualified privilege to withhold, on therapeutic grounds, information that would normally be material.[126] The physician may withhold disclosure in an emergency situation when it is impractical to obtain the patient's consent or when the patient is incapable of giving his consent by reason of mental disability or infancy.[127] He may also withhold disclosure of alternatives and consequences that might have a detrimental effect on the physical or psychological well-being of the patient.[128]

Although the court did not specify the procedural effect to be given to these three limitations, the purpose of the doctrine, as well as theoretical consistency, indicate that these therapeutic limitations should be affirmative defenses for the physician. The purpose of the informed consent doctrine is to secure for the patient any information relevant to his decision. By establishing that the undisclosed information was material, the plaintiff establishes a prima facie breach by the physician of his duty to disclose. Such a breach effectively denies the patient information to which he has a prima facie right, and the physician should therefore have the burden of proving that his withholding was justified on these therapeutic privilege grounds.[129] Placing the burden of proof on the physician would also tend to

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125. 281 Md. at 445–46, 379 A.2d at 1023.

126. *See id.* at 444–45, 379 A.2d at 1022.

127. *Id.* at 445, 379 A.2d at 1022; *see, e.g.*, Canterbury v. Spence, 464 F.2d 772, 788–89 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Dunham v. Wright, 423 F.2d 940, 947 (3d Cir. 1970); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); Small v. Gifford Memorial Hosp., 133 Vt. 552, 557, 349 A.2d 703, 706 (1975); Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 2d 1, 13, 227 N.W.2d 647, 653 (1975). *See generally* D. HARNEY, *supra* note 8, § 2.1(A)-(B); Annots., 25 A.L.R.3d 1439 (1969); 56 A.L.R.2d 695, 699 (1957); 139 A.L.R. 1370 (1942); 76 A.L.R. 562 (1932); 53 A.L.R. 1056 (1928); 26 A.L.R. 1036 (1923).

128. 281 Md. at 444–45, 379 A.2d at 1022. *See generally* Shartsis, *Informed Consent: Some Problems Revisited*, 51 NEB. L. REV. 527 (1972).

129. *Compare* Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 12, 104 Cal. Rptr. 505, 516 (1972) *and* Waltz & Scheuneman, *supra* note 1, at 643 *and Informed Consent, supra* note 30, at 1410–14 (burden of proof on defendant) *with* Canterbury v. Spence,

promote greater respect for the disclosure requirement.[130] Recognizing that he will have the burden of proof, the physician will be likely to give greater consideration to the reasons supporting his decision to withhold than if the plaintiff has the burden. Moreover, the factors relevant to the physician's decision are beyond the patient's knowledge and control. Whether an emergency or incapacity exists, or whether disclosure would be likely to cause a detrimental physical or psychological reaction are essentially medical decisions that must be based on the physician's special training and expertise. The physician should have the burden of establishing the medical correctness of his therapeutic decision.[131]

Although most courts recognize a privilege to withhold information that would cause harm to the patient, there is a significant divergence with respect to its scope. Some courts limit the privilege to those situations in which disclosure will unduly upset an unstable patient.[132] The more common position permits nondisclosure when disclosure would so increase the patient's fear and apprehension that it would complicate or hinder the proposed treatment.[133] Some courts even permit withholding the disclosure of information likely to frighten the patient to the extent that he would be likely to forgo the treatment.[134] The standard announced in *Sard*[135] is sufficiently ambiguous to embrace all of these viewpoints. A very restricted privilege would be more consistent with the tenor of the *Sard* opinion and would best promote the purposes of the informed consent doctrine. Initially, a broad privilege would permit a physician so much discretion that it could swallow the duty to disclose. The physician could claim the privilege and withhold disclosure merely to induce the patient's consent to the treatment the physician prefers.[136] This is inconsistent with the right of the patient to

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464 F.2d 772, 791 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972) *and* Small v. Gifford Memorial Hosp., 133 Vt. 552, 349 A.2d 703 (1975) (burden on defendant only to come forward with evidence).

130. *See Informed Consent, supra* note 30, at 1410.

131. *See generally id.* at 1410–14.

132. *See* Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 12, 104 Cal. Rptr. 505, 516 (1972); Wilkinson v. Vesey, 110 R.I. 606, 628, 295 A.2d 676, 689 (1972).

133. *See* Canterbury v. Spence, 464 F.2d 772, 789 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); Natanson v. Kline, 186 Kan. 393, 406, 350 P.2d 1093, 1103, *clarified in & rehearing denied,* 187 Kan. 186, 354 P.2d 670 (1960); Aiken v. Clary, 396 S.W.2d 668, 674 (Mo. 1965); note 107 *supra.*

134. *See* ZeBarth v. Swedish Hosp. Medical Center, 81 Wash. 2d 12, 25–26, 499 P.2d 1, 9–10 (1972); note 104 *supra. See generally* D. LOUISELL & H. WILLIAMS, *supra* note 92, ¶ 22.02. *See also Neglected Aspects of Informed Consent,* 296 NEW ENGLAND J. MED. 1127 (1977) (letter to the editor) (claiming one death by myocardial infarction after disclosure but before treatment, and one patient suffering a paroxysmal atrial tachycardia 12 hours after disclosure but before treatment; neither patient had prior history of cardiac disease).

135. *See* text accompanying note 128 *supra.*

136. *See, e.g.,* Canterbury v. Spence, 464 F.2d 772, 789 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); Waltz & Scheuneman, *supra* note 1, at 642–43. *Compare* Oppenheim, *supra* note 104, at 25 *with* Note, *supra* note 51, at 1564–69 (strongly criticizing

determine for himself whether it is in his best interests to submit to a proposed treatment — the right to choose is (necessarily) the right to choose correctly or incorrectly.[137] Furthermore, there is an obvious inconsistency in permitting a physician to withhold information, which might so increase the patient's apprehension that the success of the treatment would be endangered, when disclosure of the information might have caused the patient to reject the treatment. Full disclosure may, in fact, decrease the patient's anxiety by lessening his fear of the unknown and creating a sense of confidence in the physician. Therefore, the scope of the therapeutic privilege should be confined so as to permit the witholding of significant information only when a reasonable medical certainty exists that the patient would be so psychologically distraught that he would be incapable of rationally assessing and evaluating the information,[138] or when it would be

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physicians for the attitude that they know what is best and should be able to manage the therapy without hindrance).

137. *See Informed Consent, supra* note 30, at 1407. It is doubtful that many patients would in fact refuse treatment that would be in their best interests. *See* Waltz & Scheuneman, *supra* note 1, at 641–42; Note, *supra* note 81, at 562. *See also* Alfidi, *Informed Consent — A Study of Patient Reaction,* 216 J.A.M.A. 1325 (1971) (study concluding patients react rationally to disclosure and are not deterred from treatment).

138. *See* Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 12, 104 Cal. Rptr. 505, 516 (1972); 75 HARV. L. REV. 1445, 1448 (1962). *See generally* D. LOUISELL & H. WILLIAMS, *supra* note 92, ¶ 22.02.

An additional problem, unaddressed by the *Sard* court, is how the physician establishes his claim that he withheld disclosure of information because he believed to a reasonable medical certainty that disclosure would be too physically or psychologically detrimental to the patient. The physician's decision to withhold disclosure on the therapeutic grounds would be a medical decision, suggesting that the claim of the therapeutic privilege should be established by proof that the physician acted in accord with a professional custom or standard of care. Expert testimony would be introduced to establish under what circumstances, or due to what factors, the custom of the profession permitted or obligated the physician to withhold disclosure and whether the defendant-physician acted in conformity with the custom of the profession under the circumstances. This approach, however, presents dangers similar to those presented by the professional standard of disclosure. *See* notes 44 to 60 and accompanying text *supra*. Once expert testimony that the physician conformed to the professional standard of care was introduced, his claim of the privilege would have to be upheld, thereby justifying his failure to disclose unless there was a substantial conflict between the experts. The problem would be magnified if the professional standard permitted a wide degree of individual discretion in evaluating whether the patient's physical and mental condition required withholding disclosure. Irrespective, therefore, of the scope of the privilege, the effect of permitting the claim to be established by professional custom would again be to vest the profession with the virtually absolute and unchecked discretion to claim the privilege and withhold disclosure.

Alternatively, the privilege claim could be resolved by a factual determination by the jury, after evaluating expert testimony describing the patient's physical and mental condition and the probable effect of the disclosure on the patient. This testimony, however, would not be conclusive. Rather, the jury would decide whether, on the basis of the data available to the physician in the particular case, the

likely to cause a physical reaction so severe that the treatment would be impossible to perform even if the patient did consent. A disclosure intended to promote and enhance the patient's choice fails to serve that purpose when the patient becomes psychologically incapable of making a choice. Similarly, no benefit is gained from a disclosure that makes impossible the performance of a treatment that the patient would have willingly accepted.

PROXIMATE CAUSE

To complete the traditional negligence cause of action, the *Sard* court defined the test to be used to establish the causal relationship between the failure to disclose and the resulting harm. The proximate cause rule prevents the plaintiff from recovering unless he can establish that he would not have given his consent had a full and adequate disclosure been made: "The patient obviously has no complaint if he would have submitted to the therapy notwithstanding awareness that the risk was one of its perils."[139] Although this requirement suggests that the critical inquiry is what the actual patient would have done, consistent with its earlier adoption of a reasonableness standard of disclosure, the court adopted an objective test of proximate cause, requiring that the patient establish that a reasonable person in the patient's position would have withheld consent to the surgery or therapy had all the material risks been disclosed.[140]

Originally, most courts employed a subjective test of causation in which the plaintiff had to establish that he would not have consented if an adequate disclosure had been made.[141] The courts differed, however, on the manner in which causation was to be established. Some courts required the

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physician's claim of the privilege was reasonable and justified. *See* Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 12, 104 Cal. Rptr. 505, 516 (1972) (whether physician relied on facts that would demonstrate to a reasonable man that disclosure would have seriously upset the patient); Note, *supra* note 51, at 1567. In effect, the jury would judge the physician by the standard of the reasonable person who practices medicine. *Id.* at 1567 n.101. Although this alternative would have a lay jury judge the appropriateness of the physician's exercise of his medical judgment, it would prevent the possibility that the therapeutic privilege would be used to swallow up the disclosure obligation through the mere claim of the privilege. And in practice, unless there was an inference that the physician had withheld disclosure on therapeutic grounds in bad faith, or that the claim of the privilege was an after-the-fact rationalization or trial defense, it is likely that expert testimony that the claim of privilege in the specific instance was warranted and reasonable would be viewed as extremely persuasive by the jury. Nevertheless, it is clear that both positions pose intractable problems and demonstrate the difficulty of translating the doctrine into practical application.

139. Canterbury v. Spence, 464 F.2d 772, 790 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972).

140. 281 Md. at 450, 379 A.2d at 1025. *See also* text accompanying notes 70 to 77 *supra.* The court should have added that the plaintiff must also establish by expert testimony that the undisclosed risk in fact occurred and was the medical cause of his injury.

141. *See, e.g.,* Shetter v. Rochelle, 2 Ariz. App. 358, 409 P.2d 74 (1965); *modified on other grounds,* 2 Ariz. App. 607, 411 P.2d 45 (1966); Natanson v. Kline, 187 Kan. 186,

plaintiff to plead and testify that he would not have consented if he had been informed of the risk,[142] while others were willing to infer liberally from the evidence that the plaintiff would not have consented.[143]

The *Sard* court concluded that two criticisms of the subjective standard required adoption of an objective standard of causation. First, the subjective standard essentially rests on the patient's speculative response to the hypothetical question of what he would have done if the risk had been disclosed,[144] making the credibility of the patient's testimony, which would naturally be influenced by the occurrence of an unfortunate result, the determinative factor.[145] Second, the physician would be jeopardized by the patient's hindsight and bitterness.[146] Under the objective test, the plaintiff's testimony about what he would have done is relevant but not determinative.[147]

The arguments advanced by the court are not necessarily persuasive. First, whether an objective or subjective test is used, the very nature of the cause of action requires the patient to plead and testify that he would not have consented, for he would defeat his own suit as soon as he testified that he would have consented in spite of the nondisclosure. Second, a traditional function of any jury is to resolve the witness' credibility, and potentially self-serving testimony is an inherent risk whenever an interested party testifies. A cautionary instruction could be employed to warn the jury that the credibility of the testimony must be carefully scrutinized. There does not appear to be any reason suggesting that a jury is less capable of

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354 P.2d 670, *denying rehearing and clarifying* 186 Kan. 393, 350 P.2d 1093 (1960); D. HARNEY, *supra* note 8, § 2.4(D); D. LOUISELL & H. WILLIAMS, *supra* note 92, ¶ 22.04.

142. *See* Shetter v. Rochelle, 2 Ariz. App. 358, 409 P.2d74 (1965); *modified on other grounds*, 2 Ariz. App. 607, 411 P.2d 45 (1966); Perin v. Hayne, 210 N.W.2d 609, 616 (Iowa 1973); Starnes v. Taylor, 272 N.C. 386, 393-94, 158 S.E.2d 339, 344 (1968).

143. *See* Natanson v. Kline, 187 Kan. 186, 354 P.2d 670, *denying rehearing and clarifying* 186 Kan. 393, 350 P.2d 1093 (1960); Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967). *But see* Watson v. Clutts, 262 N.C. 153, 136 S.E.2d 617 (1964) (rejecting plaintiff's testimony that she would not have consented as speculative hindsight in case of paralysis of vocal chords and reasoning that all surgery involves risk). The increasing trend appears to be an adoption of the objective standard of causation. *See* Sard v. Hardy, 281 Md. at 450, 379 A.2d at 1025 (citing cases).

144. *See* 281 Md. at 449, 379 A.2d at 1024-25.

145. *Id.; see* Canterbury v. Spence, 464 F.2d 772, 790-91 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). Actually, the patient's testimony would be known as soon as the suit is brought. He must say that he would not have consented or he will not have a cause of action.

146. 281 Md. at 449, 379 A.2d at 1025; *see* Canterbury v. Spence, 464 F.2d 772, 790-91 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Zeleznick v. Jewish Chronic Disease Hosp., 47 A.D.2d 199, 207, 366 N.Y.S.2d 163, 171 (1975).

147. 281 Md. at 450, 379 A.2d at 1025. For a criticism of the use of a causation test in informed consent cases, see Riskin, *supra* note 26; Comment, *supra* note 26.

determining the truth in informed consent actions than in any other suit.[148] Furthermore, under the objective test the jury is asked to determine whether the reasonable person would not have consented — the same sort of speculative, hindsight guess that the subjective test requires of the plaintiff.

The more persuasive reason for adopting the objective test is simply that the appropriateness of an individual's conduct is judged by the standard of conduct of the reasonable man.[149] Regardless of what each individual would or would not do in a given situation, each person is expected to act in conformity with the behavior of the reasonably prudent person. This traditional foundation of negligence law is equally applicable to a claim based on the informed consent doctrine.[150] Although the objective standard may not totally remove the necessity of engaging in hindsight, instructing the jury to consider what the average person would have done may, at least, mitigate the problems inherent in such a speculative determination. Further, it may decrease the tendency to decide for the patient out of sympathy.

Few courts or commentators have examined this area analytically. Although most of the controversy at trial may center on the materiality of the risk and the obligation to disclose, the most critical inquiry is probably whether the patient would have decided differently if the risk had, in fact, been disclosed. Given the breadth of the lay standard of disclosure, it is probable that any risk actually worth litigating would be material. It is not as probable that the reasonable patient would have acted otherwise if the material risks had been fully disclosed. One commentator has suggested that it would be reasonable to conclude that the average person in need of brain surgery to survive would not reject the treatment even if a risk of impaired speech existed.[151] The correctness of this suggestion should not be

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148. The ability of a jury to evaluate credibility is also essential under the objective standard, and a failure to judge correctly can lead to anomalous results. For example, assume that *A* would have consented, in spite of the physician's failure to disclose, but lies and says he would not have consented. Assume also that *B* honestly would not have consented. Further, assume that the reasonable person would not have consented. In this case, if the jury fails to recognize that *A* is lying, both *A* and *B* would win. In comparison, assume *A* would have consented, *B* would not have, and that the reasonable person would have consented. In this case, *B* would lose even though he would not have consented.

149. *See generally* Canterbury v. Spence, 464 F.2d 772, 784 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972).

150. Use of an objective standard to determine causation also undermines the individual patient's right of self-determination. Unlike use of an objective standard in the disclosure situation, however, in which the patient is simply a passive recipient of the information, *see* note 77 *supra,* the causation inquiry assumes hypothetically that the patient would have acted (by deciding whether to consent) if the risk had been disclosed. Because this hypothetical decision is critical in determining whether the harm suffered is in fact attributable to the physician's failure to disclose, it is not unreasonable to judge this hypothetical decision against the decision that would have been made by a reasonable person in the same circumstances.

151. *See* Waltz & Scheuneman, *supra* note 1, at 648. Some courts seem to assume willingly that a reasonable person would not reject the treatment if he had been

readily assumed. If the surgery would not reasonably guarantee success, or if it would only prolong the patient's life for a relatively short time, a reasonable person might conclude that a normal but shortened life was preferable to a longer life, the quality of which would be decreased by the impediment. Similarly, in diagnostic or elective surgery, or when the condition to be cured is not severe, a reasonable person may very well reject a treatment involving only moderately serious risks. The benefit to be gained in such circumstances simply may not outweigh the potential danger. As the *Sard* court noted, the factors relevant to determining whether a reasonable person would not have consented may be similar to those used to analyze the materiality of the information.[152] Mrs. Sard's concern for her health and financial ability to raise the child would support an inference that she would have chosen the procedure that would most likely achieve her objectives. Thus, the jury could conclude that the failure to reveal information about the risk of failure or that more efficient alternatives existed might have induced a reasonable person in Mrs. Sard's position to consent to a treatment that she would not have accepted had a full disclosure been made.[153]

DAMAGES

Although proof of actual damage is an essential element of any negligence action,[154] the *Sard* court did not discuss the measure of damages applicable to informed consent cases and there has been little discussion of it by other courts.[155] One court in dicta suggested that the plaintiff would be entitled to the loss resulting from the risk that materialized even if the treatment itself was performed carefully.[156] Although the patient should, of

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informed. *See* Shetter v. Rochelle, 2 Ariz. App. 358, 409 P.2d 74 (1965), *modified on other grounds*, 2 Ariz. App. 607, 411 P.2d 45 (1966); Starnes v. Taylor, 272 N.C. 386, 158 S.E.2d 399 (1968).

152. *See* 281 Md. at 450, 379 A.2d at 1025. *See generally* text accompanying notes 93 to 100 *supra*.

153. *See* 281 Md. at 450–51, 379 A.2d at 1025–26.

154. *See* W. PROSSER, *supra* note 26, at 143.

155. Although the Sards raised a claim for compensatory damages for the cost of raising the child born after the sterilization, *see* Brief for Appellant, Joint Record Extract at E–5 & E–9, the court studiously avoided any mention of this potential element of damage. While at times referring to a concern for the financial burden of raising a child, the court emphasized that Mrs. Sard was concerned with the potential damage to her physical well-being. *See* 281 Md. at 446, 450–51, 379 A.2d at 1023, 1025. For a discussion of how other courts have treated a claim under the so-called "wrongful birth" cases, see Annots., 69 A.L.R.3d 1250 (1976); 43 A.L.R.3d 1224, 1251–55 (1972); 27 A.L.R.3d 906 (1969); 22 A.L.R.3d 1441 (1968). *See generally* Comment, *Liability for Failure of Birth Control Methods*, 76 COLUM. L. REV. 1187 (1976); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1970); Note, *Remedy for the Reluctant Parent: Physicians' Liability for the Post-Sterilization Conception and Birth of Unplanned Children*, 27 U. FLA. L. REV. 158 (1974); 12 NEW ENGLAND L. REV. 819 (1977).

156. *See* Natanson v. Kline, 186 Kan. 393, 411, 350 P.2d 1093, 1107, *clarified in & rehearing denied*, 187 Kan. 186, 354 P.2d 670 (1960).

course, be compensated for the entire injury caused by the materialization of the risk, such a simplistic statement of the measure of damages obscures the difficult and complex considerations required to determine exactly what was the entire harm caused by the risk. An uncritical compensation for the entire harm suffered by the patient is potentially unfair to the physician who was neither negligent in the performance of the treatment nor capable of preventing the actual materialization of the risk.[157]

The basis of liability arising out of a failure to secure an informed consent is that the patient would not have consented to the treatment if the risk had been properly disclosed. To insure that the patient is compensated only for the harm actually caused by the risk without holding the physician liable for injuries that would have arisen even if a proper disclosure had been made, the patient should be compensated only to the extent that the undisclosed risk would in any event have contributed to his condition.[158] The issue presents a mixed question of causation and damages. If the patient would not have consented if the risk had been disclosed, he would have either refused all possible treatments or chosen an alternative treatment. It is possible that some "injury" would have occurred under either of these courses, either through a continuing decline in the original condition or the materialization of the same or different risk in an alternative procedure. If it can be established with some certainty that the patient's probable condition had he refused the treatment would be worse than the injury actually suffered, or conversely, if it cannot be established that his probable condition would be better than his actual condition, the patient cannot prove that the physician's failure to disclose actually caused him any damage.[159] Therefore, the basic measure of damages clearly should be the difference between the patient's probable condition if he had rejected the treatment actually undergone and his actual condition after the undisclosed risk materialized.[160]

The simplest situation illustrating the application of this measure of damages is that in which the undisclosed risk materialized in the only available method of treatment appropriate to treat or cure the patient. If the patient would not have consented upon a proper disclosure, no alternative treatment existed and the original condition sought to be cured would remain uncured. The patient's probable condition would be that probably resulting from leaving his original condition untreated. Thus, the measure of damages would be the economic valuation of the difference between his

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157. *See* Waltz & Scheuneman, *supra* note 1, at 649.

158. *Id.*

159. *See generally* Rewis v. United States, 503 F.2d 1202 (5th Cir. 1974); Dillon v. Twin State Gas & Elec. Co., 85 N.H. 449, 163 A. 111 (1932); State, Dep't of Environmental Protection v. Jersey Cent. Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976); Barnett v. Chelsea and Kensington Hosp. Management Comm., [1969] 1 Q.B. 428; Peaslee, *Multiple Causation And Damage*, 47 HARV. L. REV. 1127 (1934). *See also* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 31 (1935).

160. *See* Waltz & Scheuneman, *supra* note 1, at 649; Note, *supra* note 81, at 550.

actual condition after the undisclosed risk materialized and his probable condition without any treatment.[161] In effect, the damage attributable to the risk must be offset by the damage that would probably occur if the patient did not undergo treatment.[162]

The availability of alternative treatments, however, creates many practical problems in determining the patient's probable condition. The jury must first determine whether the patient would have chosen one of the alternative treatments if the undisclosed risk had been disclosed originally.[163] If the patient would have rejected all alternative treatments, then the situation would be the same as if no alternative treatments had existed, and the measure of damages would be similarly calculated.[164] If the patient would not have rejected all alternative treatments, the measure of damages may be substantially modified. The jury must determine which alternative the patient would have chosen. If the undisclosed risk was not present in any alternative that would have been chosen, the patient would be compensated for the entire harm caused by the risk.[165] Because the alternative treatment would most probably have been successful, the patient's probable condition would be that of a person with a successfully completed treatment. Therefore, the difference between his probable

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161. *See* note 160 *supra.*

162. Abraham, *Medical Malpractice Reform: A Preliminary Analysis,* 36 MD. L. REV. 489, 498 (1977).

163. An additional issue is whether the determination of the plaintiff's probable choice of alternatives should be governed by the probable choice of the actual patient or an objective standard based on the probable choice of the reasonable person. Because the determination of the patient's probable choice may determine whether he suffered any legal injury (*i.e.,* whether the physician's failure to disclose caused the actual injury), *see* notes 164 to 169 and accompanying text *infra,* it could be argued that the objective standard should be used for the same reasons it is used to resolve the causation issue, *see* notes 144 to 150 and accompanying text *supra.* Once the patient has established that he would not have consented had the information been disclosed originally, however, the question is the damage to the actual, rather than reasonable, patient. Therefore, the question of the patient's probable choice should be based on the choice of the actual rather than objective patient. *But see* Note, *supra* note 81, at 550. As noted previously, the objective standard undermines the actual patient's right of choice, and the probable choice of treatment is a uniquely subjective choice made after analyzing the risks and hazards presented by each treatment in light of the patient's subjective preferences. The use of an objective standard to govern resolution of the causation issue and a subjective standard to resolve damage issues reaches a reasonable accommodation of the competing interests of patient and physician. The physician receives sufficient protection against the unfair imposition of liability by the objective causation element, *see* notes 139 to 140 & 144 to 150 and accompanying text *supra,* and the use of a subjective standard for resolving damage issues gives effect to the right of the individual patient to choose the treatment based on his own subjective preferences. Moreover, if the jury finds that the patient's testimony is incredible — for example, if it appears to have been offered solely to secure a more advantageous measure of damages — then it should estimate what the patient's actual conduct would have been.

164. *See* text accompanying note 161 *supra.*

165. *See* Waltz & Scheuneman, *supra* note 1, at 649.

condition and his actual condition would be the entire harm caused by the risk, and there would be no offset of damages due to the patient's probable condition.

The patient may have chosen an alternative in which the undisclosed risk was also present at the same or different frequency.[166] Because the same risk is involved in both the treatment actually chosen and the treatment that would have been chosen if the risk had been disclosed, it is possible that the same risk would also have materialized in the alternative that would have been chosen. Therefore, to be able to determine the patient's probable condition, and thereby the damages, it must be determined if the risk would also have actually materialized if the alternative that would have been chosen had been performed. To reach this conclusion, it must be determined whether the materialization of the risk in each alternative would be caused by the "same or similar" medical factor(s). It cannot be said that the risk that actually occurred would probably materialize in the alternative merely because the risk occurred in the treatment actually performed. Only if the medical factor(s) causing the risk to materialize in one alternative are the

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166. Alternatives involving the same risk that was originally undisclosed present conceptual and practical difficulties. To prove the causation element of his cause of action, the patient must establish that the reasonable person would not have consented if the risk had been disclosed. If it is probable that, upon disclosure, the patient would have chosen an alternative that included the same risk at the same (or greater) frequency of occurrence, it would seem that the patient could not prove a legal injury because he is at the same time stating that he would both have accepted and rejected the same risk. Although it is more likely than not that a patient would not choose an alternative containing the same risk at the same or greater frequency, the possibility would exist in some circumstances. Each alternative treatment may contain a "package" of various risks, hazards, probabilities of success, and probable outcomes, and it is reasonable to assume that an informed patient would consent to a particular treatment after evaluating the mix of each "package." For example, one treatment may offer a 99% probability of success and contain a 5% probability of risk *A*, a 1% chance of risk *B*, and a ½% likelihood of risk *C*. A second treatment may offer a 90% probability of success and a 5% probability of risk *A* and a ½% chance of risk *X*. Thus, each alternative treatment contains a different "package" of risks. Without disclosure of a particular risk, one "package" may be preferable to another. The other "package," however, may be preferable upon disclosure even though it contains the same risk. For example, in the hypothetical above, the patient may have selected the first treatment, due to its greater probability of success, if the 5% probability of risk *A* had not been disclosed. If the risk were disclosed, however, the second treatment with the same risk and offering a lower probability of success may have been preferable. The total danger presented by the combination of risks *A*, *B*, and *C* in the first treatment may have caused the patient to refuse to consent if the danger of *A* had been disclosed. Even though risks *B* and *C* alone were insufficient to have caused the patient to withhold consent to the first treatment, they are not present in the second treatment. Thus, as long as the medical factor(s) that would cause risk *A* to materialize in each treatment are not the "same or so similar" in their causal relationship to the risk that it can be said that the risk would probably materialize in the second treatment, then the second treatment offers a 90% probability of success and a 95% probability that risk *A* would not materialize. It might, therefore, be preferable to the first treatment.

same, or similar in their causal relationship to the risk, to the medical factor(s) causing the risk to materialize in the other alternative can it be said that if the risk materializes in one alternative that it will probably materialize in the other. If the medical factor(s) that produce the risk are not the same, or similar in their causal relationship to the risk, then they are independent, and it cannot be said that the same risk would probably materialize if the alternative had been chosen.[167] Thus, whenever the same risk is involved in each alternative, two different damage situations are possible. If the medical factor(s) causing the risk to materialize in each case are neither the same factor(s), nor similar in their causal relationship to the risk, then even though the same risk is present in each alternative, the occurrence of the risk in the original treatment does not indicate that the risk would be substantially likely to materialize in the alternative. If the factor(s) triggering the risk in each alternative are thus independent of each other, then, because the incidence of most risks is well below fifty percent,[168] the unchosen alternative treatment probably would have been successful and uneventful. Therefore, the damage — the difference between the actual (injured) condition and the probable (uninjured) condition of a successful operation — would be the entire harm caused by the risk. Alternatively, expert testimony may be able to establish that the medical factor(s) that cause the risk to materialize in each alternative are the same or so similar in their causal relationship to the risk that more probably than not the same risk would also have materialized in the alternative that the patient would have chosen. The patient's probable condition would then reflect the probable materialization of the same risk that actually occurred, and his damages would be the difference between his actual condition and the condition incident to the materialization of the same risk in the alternative treatment. Thus, because the same risk that actually occurred would more

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167. The *Sard* case offers a possible example. The risk of failure in the actual treatment performed was two percent. The alternative treatments offered risks of failure of less than one-tenth of one percent. 281 Md. at 437, 379 A.2d at 1018. If the reason that the risk of failure materializes in the alternative treatments is not the same as the reason that the risk of failure occurred in the actual treatment, then the cause(s) of the failures in each alternative are independent of each other and it cannot be said that the failure would probably materialize had one of the alternatives been chosen. Thus, if the cause(s) of the failure are independent, then the probability of success if one of the alternatives had been chosen is at least 99.9%.

168. *See, e.g.*, cases cited in notes 92, 94, 95 & 96 *supra*. It must be remembered that the measure of damages in informed consent cases is based on the difference between the patient's actual condition and probable condition. *See* text accompanying note 160 *supra*. The frequency of the occurrence of most risks is relatively low, usually less than 10 %. For any given treatment, therefore, the probability that the risk will not materialize is usually at least 90%. Unless the medical cause(s) of the occurrence of the risk in the alternative that would have been chosen are the same as the cause(s) in the treatment actually performed, it is more probable than not that the same risk would not have materialized in the alternative even though it did occur in the treatment actually performed. Thus, the patient's probable condition, had the alternative been chosen, would be that of a successful treatment.

probably than not also materialize in the alternative that would have been chosen, the defendant would have a very compelling argument that the patient had suffered no damages.[169]

Finally, aside from the problems presented whenever the alternative treatment involves the same risk that was undisclosed in the actual treatment, any determination of the patient's probable condition must also consider the possibility that an additional risk, causing an entirely different injury, might have resulted from the alternative treatment. In theory, the patient's probable condition would have to be adjusted to reflect the possibility that the additional risk would have materialized. In practice, however, it is most unlikely that a jury would be permitted to consider this question Because its frequency of occurrence is usually fairly low, any attempt to determine whether the additional risk would have occurred would be extremely speculative.[170] At best, therefore, the jury might be permitted to

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169. This, of course, assumes that the plaintiff is held to an all-or-nothing recovery, that is, that he can recover the entire loss if he can establish that, based on the difference between his actual and probable conditions, he has been damaged, but can recover nothing if he is unable to prove that it is more probable than not that he was damaged by the doctor's failure to disclose. Damages need not be calculated on an all-or-nothing basis, however, and it should be noted that even if the defendant produces expert testimony that the same risk probably would have materialized in the alternative treatment, it might still be possible for the plaintiff to recover at least part of his loss. The plaintiff may be able to produce expert evidence demonstrating the statistical probability that the same risk would materialize only a certain percentage of the time in the alternative that would have been chosen if it in fact occurs in the treatment actually performed. For example, suppose risk *X* occurred in the actual treatment *A*. Because the factor(s) causing risk *X* to occur in treatment *A* are the "same or so similar" in their causal relationship to the factor(s) causing risk *X* to materialize in the alternative treatment *B* that would have been chosen, expert testimony can establish that the risk probably would have materialized in treatment *B* and that the plaintiff did not therefore suffer any legal injury. The plaintiff may then be able to prove that if risk *X* materializes in treatment *A*, there is only a 65% chance (for example) that it would also materialize in treatment *B* even though the factor(s) causing risk *X* to materialize in either treatment are the "same or similarly" related. In this situation, the plaintiff should be able to argue that his damage was the lost 35% chance of a successful treatment and should be entitled to recover 35% of the economic value of the injury suffered. *See generally* C. MCCORMICK, *supra* note 159, § 31, at 122–23 (in valuing a less-than-even chance for a single specific event, if the value of the chance is not outweighed by countervailing risk of actual loss and fairly measurable by calculable odds, evidence bearing specifically on the probabilities, or by expert opinion, and the amount of expected gain is itself fixed or approximately ascertainable, the jury should be allowed to value the lost opportunity).

170. For example, assume that the highest frequency of occurrence of any of the risks inherent in the treatment is five percent. It would be extremely difficult for a jury even to begin to predict whether that risk would have materialized for any given performance of the treatment, and it is unlikely that any expert testimony could establish whether it would materialize. Moreover, the probability that it would not materialize is 95%. Thus, although in theory some allowance for the possible occurrence of such a risk should be made in determining the patient's probable condition, it would be too difficult to do so in practice. The net effect may be that it would have to be presumed that such a risk would not have occurred.

reduce the damage award if such additional risks have a fairly high incidence. If not, the jury would be instructed to presume that the additional risk would not have occurred.

Quite simply, it is clear that a proper attempt to calculate damages in informed consent cases opens the proverbial can of worms. The jury will have to make extremely complex and difficult calculations. It will have to determine both the patient's probable course of conduct if he had refused the treatment and the probable condition resulting from that choice, and estimate the economic value of the difference between the actual harm caused by the undisclosed risk and the probable harm of the condition that would have resulted if the treatment had been rejected. Although this valuation would not be difficult when the patient is to be compensated for the entire harm caused by the risk, it could be extremely difficult when the actual damages are to be offset by a valuation of the patient's probable condition. The difference between the actual and probable conditions may be *de minimus* or too speculative to prove. For example, it may simply be too difficult to determine damages when a serious ulcer, which would have gone untreated because the patient would have refused the treatment had a risk been disclosed, is treated, and the risk's occurrence necessitates the removal of the spleen and causes the development of a gastric ulcer.[171] An additional, and in some respects disturbing, consequence is that a patient, though seriously injured in fact, may not be able to establish that his injury resulted from the physician's failure to disclose. If the damages are *de minimus,* or too speculative, or legally nonexistent because death would have resulted without treatment or the probable condition would be worse than the condition resulting from the risk's occurrence, the plaintiff could not establish any damage and, therefore, could not prove one of the elements of his cause of action.

The *Sard* case itself offers an interesting example of the potential difficulties associated with calculating damages in informed consent cases. Initially, the court found that the physician failed to inform the Sards that the operation might not be totally successful.[172] The damage alleged to have resulted from this failure to disclose was the birth of the child with extra pain and suffering and economic expense attributable to the delivery, as well as the economic expense of raising the child.[173] To establish one part of her cause of action, Mrs. Sard would have to plead that she would have refused the treatment if the risk had been disclosed. If Mrs. Sard had refused the sterilization and not chosen to adopt alternative birth control methods, it is probable that she would still have become pregnant. Therefore, because her probable condition without the treatment would be the same as her actual condition, she could not allege that the failure to disclose the risk

171. This example is taken in part from Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

172. *See* 281 Md. at 445-46, 379 A.2d at 1023.

173. *See* note 155 *supra.*

caused any harm that probably would not have occurred if the risk had been disclosed.[174] It is likely, however, that Mrs. Sard would have chosen to employ an alternative method of prevention. Mrs. Sard could have chosen to use an oral contraceptive, diaphragm, or intrauterine device. Alternatively, Mr. Sard could have chosen, for example, to have a vasectomy. Although each of these methods includes an inherent risk of failure,[175] the medical cause of the failure would probably be different than the medical cause of the failure of Mrs. Sard's tubal-ligation. Therefore, even though there is some possibility that Mrs. Sard would also have become pregnant had she chosen one of these alternatives, the possibility is so speculative that it would have to be assumed that her probable condition would have been a successful prevention of a pregnancy. Thus, Mrs. Sard would be entitled to damages for the entire harm caused by the failure of the sterilization.

Mrs. Sard could also have chosen one of the alternative methods of performing the sterilization, in which case the risk of failure would have been reduced to less than one-tenth of one percent, or she could have chosen to delay the sterilization until after the Caesarean section, in which case the risk of failure would have diminished dramatically. If the medical cause(s) of the failure of the sterilization procedure for these alternatives are not the "same or so similarly" related that it can be said that more probably than not the risk would have materialized no matter which alternative had been chosen, then the probability of success would be at least ninety-nine percent, and Mrs. Sard's probable condition would have been a successful sterilization. Her damages would be the entire harm caused by the failure of the actual treatment performed. If the medical cause(s) of the failure in each of the various sterilization procedures are the same or so similar in their causal relationship to the risk that it was more probable than not that the alternative sterilization methods would also have failed, then it is more probable than not that Mrs. Sard would have still become pregnant. Therefore, because her probable condition would have been the same as her actual condition, she could not prove that the physician's nondisclosure caused her any damage.[176]

The net result of cases such as *Sard* is that a plaintiff's inability to prove actual damage will relieve the physician of liability even though he failed to meet his duty to disclose information material to the patient's condition. In one sense this is consistent with the traditional principle that negligence without harm is not actionable and that there will not be compensation without actual injury. It does, however, seem unfair. First,

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174. *See* text accompanying notes 159 to 160 *supra*.

175. Each of these alternatives may also include some additional inherent danger. For example, use of an oral contraceptive has an inherent risk of a stroke. *See* Hamilton v. Hardy, 549 P.2d 1099 (Colo. App. 1976).

176. In this situation, Mrs. Sard could attempt to prove the statistical probability of the risk's materialization in one of the alternatives when it occurs in the actual treatment, and argue that her damages are the economic value of the lost chance or opportunity for a successful treatment. *See* note 169 *supra*.

there is a deprivation of the right of choice promoted by the doctrine of informed consent.[177] Second, the plaintiff may, in fact, have suffered some harm yet be unable to prove it due to the speculativeness of the inquiry. Therefore, although the denial of the information may have caused a significant harm, the physician's breach will remain unremedied.[178]

CONCLUSION

The problems posed by the damage element graphically demonstrate the problems of consistently translating theory into practical application and reaching a balanced accommodation of the essentially diverse interests inherent in the informed consent doctrine. There is no *a priori* reason to require disclosure. The patient is seeking a cure and the physician has proposed the optimal treatment to effect that cure. It is very unlikely that a physician would propose a treatment with a significant likelihood of occurrence of an adverse risk, except in certain extreme and desperate cases. Further, it must be remembered that there is some risk of death or serious injury in even the simplest treatments. Nevertheless, it is part of the traditional American philosophy that the individual is more capable of determining what action most advances his own best interest than is another individual and that an individual should not be required to assume

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177. Although the patient may have suffered a loss of this dignitary interest, *see* Comment, *supra* note 26, such an injury is not generally compensated by negligence law. *See* Riskin, *supra* note 26, at 589.

178. A possible resolution would be to abandon the traditional negligence formulation and declare that as a matter of social policy it is unfair to expect a patient to bear the full brunt of the infrequent, unpredictable, and unpreventable risks that may occur, and that society will assume, by cost sharing through insurance, the responsibility to aid the patient so victimized. This resolution would also provide compensation for the denial of the right of choice and self-determination, which negligence law does not compensate, *see* note 176 and accompanying text *supra*, and would provide compensation for the plaintiff who may in fact have suffered an injury but be unable to prove his damages due to the difficulties of proof outlined above. *See* notes 157 to 170 *supra*. The effect of such a scheme would approach strict liability. An additional benefit would be the elimination of strained attempts to find fault in the physician's conduct in order to fit the remedy within traditional negligence law. *See generally* Clark v. Gibbons, 66 Cal. 3d 399, 414-21, 426 P.2d 525, 535-40, 58 Cal. Rptr. 125, 135-40 (1967) (Tobriner, J., concurring).

One commentator has suggested that informed consent is part of a trend approaching strict liability. *See* Meisel, *The Expansion of Liability For Medical Accidents: From Negligence to Strict Liability By Way of Informed Consent*, 56 NEB. L. REV. 51 (1977). The evolution of the doctrine provides some support for this view. The informed consent doctrine allows the patient to hold the physician liable even though he could not be sued in traditional malpractice for negligent treatment and even though the occurrence of the risk is medically unpreventable. Similarly, although the professional standard of disclosure follows traditional malpractice law by judging the physician by the customs of the profession, the lay standard permits the jury to judge the appropriateness of the physician's conduct. If the "but for" aspect of causation is eliminated by recognizing that part of what is lost is the patient's right of self-determination, *see* Riskin, note 26 *supra*, then the last bastion protecting against strict liability would be eliminated.

responsibility for a risk unless he was aware of the risk. Thus, courts adopting the lay standard have decided that it is better policy to permit the individual to decide whether the benefits outweigh the risks.

Having decided that the individual right of self-determination is sufficient to impose a duty on the physician, the standard adopted in *Sard* reaches an accommodation that effectively promotes the right of choice. Although sacrificing the individual's right of choice to some degree, the objective standard does protect against retrospective speculation and personal idiosyncracies. Nevertheless, the lay standard more effectively promotes disclosure of information necessary to an intelligent choice than does a standard relying on the medical profession itself. Although the physician's discretion is significantly circumscribed, it is consistent with the policy choice to let the patient make the ultimate decision, and a measure of discretion remains in the therapeutic privilege when a medical decision is truly required. Whether the court will continue to construe the disclosure requirement as broadly as indicated in *Sard* and suggested by this Comment is unclear. There is language in the court's opinion that would permit a court to find as a matter of law that a risk is so obvious or so common that disclosure is not required. Whether the Court of Appeals will deem it wise to control the limits of the required disclosure remains to be decided.[179]

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179. Although the *Sard* opinion could not be cited to support the proposition, the reasoning of the opinion would indicate that the informed consent doctrine could be successfully applied to attorneys. A client should have the same right to make the ultimate decision over the course of his legal affairs, and adequate information is as essential to this decision as it is to deciding the patient's course of medical treatment. Both the physician and the attorney are professionals. Each has a fiduciary relationship with the client obligating him to act in the client's best interest. Both can potentially control and significantly influence the outcome of the patient's future. Both deal with a body of knowledge outside the common understanding of the average layman. Information relating to the future or alternative courses of a client's suit and the related potential risks and consequences is as essential to plotting a course as the information that must be disclosed by the physician. In addition, information about legal affairs is probably more comprehensible to the layman than is medical information. *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, *Ethical Considerations* 7-5 to -12 (1976).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: A NEW TORT FOR MARYLAND — *HARRIS v. JONES*

In *Harris v. Jones,*[1] the Maryland Court of Appeals joined the majority of American jurisdictions[2] by authorizing an independent cause of action for the intentional infliction of emotional distress.[3] Essentially, this tort permits a plaintiff to recover for extreme and outrageous conduct that intentionally or recklessly causes him severe emotional distress.[4]

Throughout his life, William Harris, the plaintiff, had stuttered severely, at times causing him to shake his head up and down when he attempted to speak long words or sentences.[5] While employed by the General Motors Corporation, Harris' supervisor was Jones, who over a five month period approached Harris several times, chiding Harris about his nervousness and ridiculing him by physically and verbally mimicking his stutter. Although Harris at one point requested a transfer to another department, Jones refused the request while mockingly imitating the manner in which Harris bobbed his head up and down and mimicking Harris' mispronounciation of the word "committeeman."[6] As a result of this incident, Harris filed a grievance complaint with his union committeeman. General Motors responded by instructing Jones to act in a manner befitting a supervisor and the grievance was satisfactorily settled. When Jones continued the taunting, Harris filed another complaint which was also satisfactorily settled after General Motors again instructed Jones to conduct himself properly in the future.[7] Finally, after five months of sporadic taunting, Harris filed a civil

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1. 281 Md. 560, 380 A.2d 611 (1977).

2. Cases from 21 jurisdictions are collected in Annot., 64 A.L.R.2d 100, 119-26 (1959). For an additional collection of cases, see Harris v. Jones, 281 Md. 560, 564-65 n.1, 380 A.2d 611, 613 n.1 (1977). *See generally* 38 AM. JUR. 2d *Fright, Shock, and Mental Disturbance* § 17 (1968).

3. 281 Md. at 566, 380 A.2d at 614. As used here, "emotional distress" is indistinguishable from other terms such as mental distress, emotional harm, or psychic damage. Such a usage is consistent with the usage of courts and other commentators.

Prior to *Harris,* Maryland permitted compensation for emotional distress only as an element of damages resulting from the defendant's commission of an independently recognized tort. *See* notes 18 to 28 and accompanying text *infra.* The tort of intentional infliction of emotional distress recognizes emotional equilibrium as a legally protected interest *per se* and is distinct from actions in which mental distress is compensable only as an element of damages. *See* Campos v. Oldsmobile Div., G.M. Corp., 71 Mich. App. 23, 246 N.W.2d 352 (1976) (tort of intentional infliction of emotional distress distinguished from an action for defamation, in which damage to reputation is the gravamen of the tort and mental distress is merely an element of damages).

4. *See* 281 Md. at 566, 380 A.2d at 614.

5. *See id.* at 562, 380 A.2d at 612. At trial, Harris frequently responded to questions by writing out the answers. *See* Joint Record Extract at 1-3, 67-68, Jones v. Harris, 35 Md. App. 556, 371 A.2d 1104, *aff'd,* 281 Md. 560, 380 A.2d 611 (1977).

6. 281 Md. at 562, 380 A.2d at 612. Harris pronounced "committeeman" as "mmitteeman."

7. *Id.* at 562-63, 380 A.2d at 612.

action against Jones and General Motors for the intentional infliction of emotional distress.[8] The defendants appealed from a jury award in favor of Harris.

Acknowledging the widespread recognition of the tort of intentional infliction of emotional distress, the Court of Special Appeals was persuaded that the tort would be viable in Maryland in a proper case.[9] It concluded that Jones' actions were intended to inflict emotional distress,[10] but that the evidence was insufficient as a matter of law to establish either that Harris had suffered severe emotional distress or that any distress that had been suffered was caused by Jones' conduct.[11]

The Court of Appeals unanimously affirmed. In an opinion written by Chief Judge Murphy, the court acknowledged the widespread acceptance in other jurisdictions of a right to recover for severe emotional distress caused by the intentional act of another[12] and agreed that the tort should be

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8. Harris alleged that Jones' actions occurred during the course of his employment with General Motors and that General Motors had ratified this conduct. *Id.* at 562, 380 A.2d at 612. Although an employer generally is not held responsible for the intentional torts of its employees, liability will be imposed in some circumstances. One such circumstance is intentional conduct that occurs during the course of the employee's employment. The requirements for imposing liability on the employer in this situation were set forth in Lepore v. Gulf Oil Corp., 237 Md. 591, 595, 207 A.2d 451, 453 (1965): (1) the act of the agent must have been done within the scope of his employment; (2) the act must have been done in furtherance of the employer's business; and (3) the act must have been authorized by the employer, in the sense that the act was incident to the performance of the duties given to the agent by the employer even if in opposition to the employer's express orders.

Alternatively, liability may be imposed if the employer ratified the employee's conduct. *See, e.g.*, Turner v. American Dist. Tel. and Messenger Co., 94 Conn. 707, 110 A. 540 (1920); Edwards v. Kentucky Utils. Co., 289 Ky. 375, 158 S.W.2d 935 (1942); Tauscher v. Doernbecher Mfg. Co., 153 Or. 152, 56 P.2d 318 (1936). At least one court has indicated that a principal may be liable for his agent's intentional infliction of emotional distress. In Rosenberg v. Packerland Packing Co., 55 Ill. App. 3d 959, 370 N.E.2d 1235 (1977), the plaintiff brought an action against the principal corporation for an agent-driver's intentional infliction of emotional distress. The plaintiff alleged that an unknown driver of the defendant drove a tractor-trailer at speeds of 70-80 m.p.h. within two feet of plaintiff's car. Even after the plaintiff signalled for the truck driver to pass, the driver continued to feint at the rear of plaintiff's car. The court held that two theories could sustain an action against the principal. First, an action could be maintained against the defendant trucking company for willful, wanton, or intentional entrustment of its truck to an incompetent driver. *Id.* at 965, 370 N.E.2d at 1240. Second, if the plaintiff could demonstrate that the defendant negligently permitted its truck to operate in violation of Interstate Commerce Commission rules and regulations, the jury could find that the driver's intervening intentional tort was foreseeable and that the defendant's violation of the rules and regulations was the proximate cause of plaintiff's injuries. *Id.* at 955-56, 370 N.E.2d at 1240-41.

9. Jones v. Harris, 35 Md. App. 556, 558-61, 371 A.2d 1104, 1106-07, *aff'd*, 281 Md. 560, 380 A.2d 611 (1977).

10. *See id.* at 570, 371 A.2d at 1111.

11. *See id.* at 570-71, 371 A.2d at 1111-12.

12. 281 Md. at 564, 380 A.2d at 613.

sanctioned in Maryland.[13] The court then defined the four elements of the tort that must coalesce before liability can be imposed. The plaintiff must establish that: (1) the defendant's conduct was extreme and outrageous; (2) the defendant's conduct was intentional or reckless; (3) there was a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress was severe.[14] In addition, two difficulties — "distinguishing the true from the false claim," and "distinguishing the trifling annoyance from the serious wrong"[15] — were identified as inherent in recognizing such a tort, and the court stressed that the four elements of the tort should be strictly followed in order to minimize these problems.[16] After discussing each element, the court held that in Harris' case, the "fourth element of the tort — that the emotional distress must be severe — was not established by legally sufficient evidence justifying submission of the case to the jury."[17]

Partially due to the inherent difficulty of determining whether a person actually has suffered emotional distress, courts have struggled for decades to define the appropriate scope of protection to be accorded emotional equilibrium. Traditionally, most courts were reluctant to permit the infliction of emotional distress to provide the sole basis for a cause of action.[18] Although refusing to recognize emotional equilibrium as a legally protected interest *per se,* most courts allowed recovery if mental distress was claimed as an additional, parasitic element of damages attached to an independent, traditionally recognized tort such as a battery or an action for false imprisonment.[19] As long as some other legally protected right had been

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13. *Id.* at 566, 380 A.2d at 614. Strictly speaking, the court's apparent recognition of the tort is dicta, because it subsequently affirmed the Court of Special Appeals' holding that the evidence was insufficient to establish the elements of the tort.

14. *Id.* at 566, 380 A.2d at 614. The *Harris* court relied heavily on Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974). In *Womack,* the Virginia Supreme Court held that a cause of action for intentional infliction of emotional distress may be maintained even though the mental distress is unaccompanied by physical injury. *Womack* essentially followed the provisions of RESTATEMENT (SECOND) OF TORTS § 46 (1965) which provides in part: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

15. 281 Md. at 566, 380 A.2d at 614.

16. *See id.*

17. *Id.* at 570, 380 A.2d at 616 (footnote omitted).

18. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 49-50, & § 54, at 328-29 (4th ed. 1971). Lord Wensleydale observed over a century ago that "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful conduct complained of causes that alone." Lynch v. Knight, 11 Eng. Rep. 854, 863 (H.L. 1861).

19. *See* W. PROSSER, *supra* note 18, § 12, at 51-52. As stated in RESTATEMENT OF TORTS § 47, Comment b, (1934), an individual's interest in emotional well-being was given only partial legal protection. If the sole effect of the tortious conduct was to cause emotional distress, the plaintiff could not maintain a cause of action against

violated, courts generally were willing to permit recovery for emotional harm. Nevertheless, to insure objectively that the plaintiff was not feigning emotional harm, most courts required that the emotional distress be accompanied by, or result in, some physical injury.[20]

The search for objective corroboration of alleged mental distress is reflected in the rules commonly used to determine whether recovery will be permitted for mental distress that results from conduct that is merely negligent. Most courts, while clearly permitting recovery for mental harm or anguish attributable to physical injuries caused by the defendant's negligent conduct, will not permit recovery when the negligent conduct causes only mental distress.[21] When, however, a physical injury results from the plaintiff's fright or shock caused by the negligent conduct, two distinct rules — the "impact rule" and the "subsequent physical injury rule" — have developed to determine whether the mental distress is sufficiently corroborated. Courts that follow the "impact rule" permit recovery if there has been some contemporaneous physical impact upon the plaintiff's person,[22] apparently on the theory that the occurrence of an impact provides adequate assurance that the resulting emotional distress is genuine. Other courts conclude that sufficient objective corroboration exists when the mental distress causes and is evidenced by a subsequent physical injury.[23] The

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the defendant. If the defendant's conduct caused other recoverable damages, however, the emotional disruption could have been attached as an additional element of damages. *See also* Deevy v. Tassi, 21 Cal. 2d 109, 130 P.2d 389 (1942) (malicious assault and battery); American Security Co. v. Cook, 49 Ga. App. 723, 176 S.E. 798 (1934) (trespass); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927) (invasion of privacy); Patapsco Loan Co. v. Hobbs, 129 Md. 9, 98 A. 239 (1916) (trespass); Fisher v. Rumler, 239 Mich. 224, 214 N.W. 310 (1927) (false imprisonment); Haeissig v. Decker, 139 Minn. 422, 166 N.W. 1085 (1918) (seduction); Williams v. Underhill, 63 A.D. 223, 71 N.Y.S. 291 (1901) (assault; *semble* battery); Allen v. Hannaford, 138 Wash. 423, 244 P. 700 (1926) (assault).

20. *See* W. PROSSER, *supra* note 18, § 12, at 59.

21. *See id.* § 54, at 330. In a cause of action for negligence, the occurrence of physical harm is considered sufficient evidence that mental harm was actually suffered to permit recovery for mental distress as a parasitic element of damage.

22. Although its terms vary among jurisdictions, unless the plaintiff can demonstrate that he sustained a physical impact as a result of the defendant's conduct, the "impact rule" precludes recovery for mental distress. *See* 42 U. MO. K.C. L. REV. 234 (1973). Once in force in most jurisdictions, the "impact rule" has been criticized extensively and presently has been abandoned by most jurisdictions. The Maryland Court of Appeals refused to adopt the "impact rule" at a time when the rule was prevalent elsewhere. *See* Green v. Shoemaker, 111 Md. 69, 73 A. 688 (1909).

23. With the abandonment of the "impact rule," courts have increasingly permitted evidence of subsequent physical injuries to validate the existence of mental distress. Considerable disagreement, however, surrounds the definition of physical injury. Some courts only permit miscarriages, heart attacks, or other similarly dramatic physiological changes to corroborate the existence of mental distress. In contrast, other courts have accepted such physical manifestations as headaches, dizziness, sleeplessness, irritability, nausea, and back pains. *See* Annot., 64 A.L.R.2d 100, 127 (1959). *See generally* Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1933); Smith, *Relation of Emotions to Injury and*

"impact rule" and the "subsequent physical injury rule" have been followed primarily because of their facility of application by courts faced with the evidentiary difficulty of determining whether a plaintiff had, in fact,

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Disease: Legal Liability for Psychic Stimuli, 30 VA. L. REV. 193 (1944). The Maryland Court of Appeals defined the "subsequent physical injury rule" in Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933). In *Bowman*, the plaintiff watched through his dining room window as a truck raced out of control down an icy hill, jumped a curb, crossed the sidewalk, and crashed into the foundation of the plaintiff's house just below the dining room. The plaintiff's young children were playing in the basement at the time of the accident. Although the plaintiff did not sustain any physical impact, he suffered severe nervous shock and fright, and the Court of Appeals allowed him to maintain an action for emotional distress in accordance with the following test:

> [A] plaintiff can sustain an action for damages for nervous shock or injury caused, without physical impact, by fright arising directly from defendant's negligent act or omission, and resulting in some clearly apparent and substantial physical injury, as manifested by an external condition or by symptoms clearly indicative of a resultant pathological, physiological, or mental state.

Id. at 404, 165 A. at 184.

The Court of Special Appeals recently applied the *Bowman* rule in Vance v. Vance, No. 78-384 (Md. Ct. Spec. App. Jan. 11, 1979). After almost 20 years of apparent marriage, Mr. Vance, the defendant, filed a petition to annul his marriage to Mrs. Vance and set aside an alimony and support decree, alleging that the marriage upon which the decree was based was invalid because he had not secured a final divorce *a vinculo matrimonii* from his first wife prior to marrying the second Mrs. Vance. Mrs. Vance sued Mr. Vance for negligently misrepresenting to her that his divorce was final and claimed to have suffered mental distress. Although the jury returned a verdict in her favor, the trial court granted a judgment *non obstante veredicto* on the ground that emotional distress alone is not compensable for negligent misrepresentation.

On appeal, the Court of Special Appeals reversed, holding that the evidence presented at trial satisfied the *Bowman* rule that emotional distress resulting in physical injury is compensable. Slip op. at 8, 9. Mrs. Vance had testified that she could not sleep or function as a result of the defendant's conduct, and that she was embarassed to socialize with former friends or to go out in public. Moreover, she testified that she thought she was going to have a nervous breakdown and had developed symptoms of an ulcer. The court did not allude to any expert medical testimony substantiating these assertions, but the plaintiff's testimony was corroborated by the testimony of both her mother and son. The plaintiff's mother testified that the plaintiff was "in a state of emotional collapse," and her son testified that his mother was emotionally depressed and that her "'hair was unkept (*sic*), the cheeks were sunken, the eyes were dark. She was a wreck.'" *Id.* at 7. The court held that the plaintiff's "nervousness, spontaneous crying, hollowed appearance, and inability to relate to the present, all constituted evidence of an external condition" satisfying the *Bowman* subsequent injury rule, *id.* at 9, thus clearly taking a liberal view of the nature and quality of the evidence sufficient to satisfy the "clearly apparent and substantial physical injury" rule of *Bowman*.

In dicta, the court went on to question the continued vitality of the subsequent physical injury rule. The court noted that in other jurisdictions, an exception to the physical injury rule permits recovery when the circumstances of the case present "'an especial likelihood of genuine and serious mental distress . . . which serves as a guarantee that the claim is not spurious.'" *Id.* at 9 (quoting W. PROSSER, *supra* note

suffered mental distress.[24] Both rules have been soundly criticized as arbitrary limitations bearing slight logical relation to the existence of emotional distress.[25]

18, § 54, at 330). Moreover, the mere fact that permitting recovery for mental distress unaccompanied by physical injury possibly could result in fictitious claims or an increase in the number of law suits is insufficient justification for denying redress of the injury. The court concluded that

> We believe it is time that courts unbind themselves from the outmoded belief that there can be no injury to the mind without overt manifestations of bodily harm. We should recognize what the health professionals already know, that the psyche is as susceptible of injury as the body, and that the absence of apparent physical damage does not serve to lessen the extent of the mental injury.

Slip op. at 10 (footnote omitted).

24. In Green v. Shoemaker, 111 Md. 69, 77, 73 A. 688, 692 (1909), the Court of Appeals rejected the argument that the "impact rule" should be adopted as a matter of judical expediency. Yet, twenty-four years later the court adopted a "subsequent physical injury" test for compensating mental distress. Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933). More recently, the court explained that considerations of expediency formed the basis of the holding in *Bowman*, H & R Block v. Testerman, 275 Md. 36, 338 A.2d 48 (1975), and applied the *Bowman* rule to deny the plaintiff's claim for mental distress, stating that "[t]he law is clear in Maryland that physical impact is not a prerequisite to mental anguish damages. . . . The cases have adhered to the *Bowman* rule, however, in requiring that there be a clearly apparent and substantial physical injury, to guard against the possibility of feigned claims." *Id.* at 48, 338 A.2d at 55 (citations omitted).

25. The logical basis of the "impact rule" has been repudiated in a number of scholarly articles. *See* Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 U. PA. L. REV. 141 (1902); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. Rev. 1033, 1036 (1936); McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1 (1949). Although evidence satisfying the "subsequent physical injury rule" would be more likely to demonstrate the existence of severe emotional distress than would the "impact rule," the subsequent physical injury rule has not escaped criticism. *See, e.g.*, Ver Hagen v. Gibbons, 47 Wis. 2d 220, 177 N.W.2d 83 (1970). In a 4-3 decision, the *Ver Hagen* court refused to abandon the requirement that a plaintiff must become physically ill as a result of the mental distress. The dissent argued that "frequently it is only an accident of pleading that the adverse consequences complained of are characterized as mental rather than physical." *Id.* at 229, 177 N.W.2d at 88 (Wilkie, J., dissenting). For commentary arguing that one should be able to maintain an action for negligently inflicted mental distress, see Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971); Note, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512 (1968).

In the so-called "bystander" cases, the "zone of danger" rule imposes an additional limitation on recovery for negligently inflicted mental distress. The "zone of danger" rule is based on the physical proximity of the plaintiff to an area within which he is in danger of personal injury from the risk created by the defendant's negligent conduct. According to this rule, recovery by a bystander who has suffered mental distress as a result of witnessing harm to a third party will depend on whether the bystander was physically endangered by being within the zone of danger created by the defendant's conduct. Thus, if the plaintiff was not threatened with physical injury because of his physical remoteness from the defendant's conduct, he may not

Although continuing to limit recovery for negligently inflicted mental distress, many courts began to accord emotional equilibrium far greater protection from intentional disruption.[26] The first cases recognizing emotional equilibrium as a legally protected interest *per se* arose in situations in which a special relationship existed between the plaintiff and defendant. For example, liability was imposed when employees of common carriers insulted passengers.[27] If a special relationship could not be found, some courts imposed liability under traditional negligence and consequential damages analysis for what was actually the intentional infliction of emotional distress.[28] Frequently, however, the judicial attempt to discover the necessary independent tort upon which to peg the mental distress as a parasitic damage element proved too far-reaching to be plausible.

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recover damages. *See generally* W. PROSSER, *supra* note 18, § 54, at 333-35. The "zone of danger" rule has been eroded recently in response to Dillon v. Legg, 69 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In *Dillon*, the California Supreme Court rejected the "zone of danger" rule and allowed a mother to recover for the emotional distress she suffered after witnessing her daughter's death. *Compare* Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952) (zone of danger rule applied) *and* Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969) (no recovery) *with* Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973) (rejecting zone of danger rule) *and* D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975) (qualified adoption of zone of danger rule).

In addition to the "zone of danger" rule, some courts use a "fear for personal safety" test. The "zone of danger" rule involves an inquiry into whether plaintiff was, in fact, physically imperiled. Under the "personal safety" test, the plaintiff must also show that he personally feared physical injury. *See* Smith v. Rodene, 69 Wash. 2d 482, 418 P.2d 741 (1966); Murphy v. City of Tacoma, 60 Wash. 2d 603, 374 P.2d 976 (1962).

26. Mental equilibrium has long been protected from certain kinds of intentional disruption. The tort of assault, for example, protects one's right to be free from apprehension of immediate harmful or offensive bodily contact. In order to maintain an action for assault, bodily contact does not have to occur; apprehension of immediate harmful or offensive bodily contact will suffice. *See* W. PROSSER, *supra* note 18, § 10.

Because the tort of intentional infliction of emotional distress encompasses a broader range of intentional acts, it arguably subsumes the tort of assault. Both torts require that the defendant's intentional conduct cause the plaintiff to suffer mental distress, but the emotional distress required by the tort of intentional infliction can be general in nature, while the tort of assault specifically requires that the plaintiff fear actual bodily contact. The tort of intentional infliction of emotional distress reaches any conduct that is "extreme and outrageous," but the tort of assault reaches only conduct that reasonably may elicit fear of immediate offensive bodily contact.

27. *See* Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956) (tracing the historical development of special liabilities that extended to common carriers, innkeepers, telegraph companies, and other groups performing public services).

28. *See, e.g.*, Young v. Western & Atl. R.R., 39 Ga. App. 761, 148 S.E. 414 (1929); Watson v. Dilts, 116 Iowa 249, 89 N.W. 1068 (1902); Hill v. Kimball, 76 Tex. 210, 135 S.W. 59 (1890); Jeppsen v. Jensen, 47 Utah 536, 155 P. 429 (1916); Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924); Prosser, *supra* note 27, at 40.

The Maryland Court of Appeals also has analyzed apparently intentional torts according to traditional negligence and consequential damage standards. *See* Mahnke v. Moore, 197 Md. 61, 71 A.2d 923 (1951); Great Atl. & Pac. Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1931). In *Mahnke*, an illegitimate four-year-old girl suffered severe emotional distress and resulting physical harm when her father murdered her

Recognizing the difficulties confronting those courts attempting to compensate deserving plaintiffs under existing tort law, several legal scholars during the 1930's proposed formulating a new tort that would expressly recognize the expanded, but not yet openly recognized, judicial protection of emotional equilibrium from intentional harm.[29] The shifting position of the American Law Institute (ALI), as set forth in its *Restatement of Torts,* reflects the ensuing widespread adoption of the tort: In 1934, section 46 of the *Restatement* stated that one is not liable for causing another to suffer mental distress, even though that suffering was inflicted intentionally,[30] but in 1948, the ALI took the liberal position that any conduct intended to cause mental distress subjects the actor to liability for such distress and for resultant harm.[31] Thereafter, cases based on the tort

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mother before her eyes. The father used a shotgun, "blowing away the right side of her head, a portion of her skull coming to rest on the kitchen table, and her body collapsing backward over a chair with her head resting in one pool of blood and her feet in another." 197 Md. at 63, 77 A.2d at 924. The father kept the child with the gory corpse for six days. He then shot himself in her presence with the shotgun "causing masses of his blood to lodge upon her face and clothing." *Id.* The court held that the girl could maintain a tort action against the father's estate but did not specify which tort formed the basis for the action. The *Mahnke* court referred often to the defendant's conduct as cruel, inhumane, malicious, and an assault, in addition to discussing a negligent failure to perform a parental duty in inflicting excessive punishment and keeping the home in negligent disrepair; but expressly refused to state that the defendant's conduct constituted a tort. *Id.* at 68, 77 A.2d at 926.

In *Roch,* a customer ordered a loaf of bread from a grocery store. Instead, the manager of the store "mistakenly" sent a dead rat. Upon opening the package, the customer fainted and allegedly suffered severe mental distress and physical injuries. The manager of the store apologized to the customer's spouse for his "mistake," and the court used this apology to provide the basis for a "negligent mistake" action even though the declaration could have been construed to allege a case of an intentional and deliberate practical joke. A possible explanation for the court's analysis is that if the court had not proceeded under a negligence theory, the principal-store would not have been liable for its manager-agent's intentional tort. For a discussion of the liability of a principal for an agent's intentional infliction of emotional distress, see note 8 *supra.*

29. The evolution of the tort has been recounted in a number of excellent articles, some of which may have been responsible for its open recognition. *See* Borda, *One's Right to Enjoy Mental Peace and Tranquillity,* 28 GEO. L.J. 55 (1939); Magruder, *supra* note 25; Prosser, *Intentional Infliction of Mental Suffering: A New Tort,* 37 MICH. L. REV. 874 (1939); Seitz; *Insults — Practical Jokes — Threats of Future Harm — How New as Torts?,* 28 KY. L.J. 411 (1940); Vold, *Tort Recovery For Intentional Infliction Of Emotional Distress,* 18 NEB. L. BULL. 222 (1939).

30. RESTATEMENT OF TORTS § 46 (1934) provided: "[C]onduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability (a) for emotional distress resulting therefrom, or (b) for bodily harm unexpectedly resulting from such disturbance."

31. RESTATEMENT OF TORTS § 46 (Supp. 1948) provided: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."

proliferated, and the ALI discerned a need "for a more limited statement which [would] set some boundaries to the liability . . . ."[32] As a result, it moved to restrict liability under the tort by requiring a plaintiff to demonstrate not only that the defendant intended to cause mental distress but also that he achieved that objective by engaging in extreme and outrageous conduct.[33]

Today, most jurisdictions follow the ALI position and impose liability for the intentional infliction of emotional distress if a defendant intentionally and through extreme and outrageous conduct causes another to suffer severe emotional distress.[34] Thus, in shedding its parasitic status, recovery for mental distress has become independent of physical injury; the plaintiff is not required to prove that physical injury either accompanied or resulted from the mental distress.[35]

The elements of the tort of intentional infliction of emotional distress recognized by the Court of Appeals in *Harris* essentially follow the ALI's definition of the tort.[36] Although much of it is dicta, the court described several factors that may be relevant in determining whether each element of the tort is met in future cases. The first element, that the defendant's conduct must be extreme and outrageous,[37] was carefully scrutinized as the *Harris* court devoted a substantial portion of its opinion to discussing the "particularly troublesome" question of determining the conduct that properly may be considered extreme and outrageous.[38] This element plays a critical role in defining the tort by limiting the types of conduct for which liability may be imposed. As the court explained, liability should not be extended

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32. RESTATEMENT (SECOND) OF TORTS, Note to the Institute, § 46, at 21 (Tent. Draft No. 1, 1957).

33. RESTATEMENT (SECOND) OF TORTS § 46 (1965) provides in part: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

34. *See, e.g.,* Womack v. Eldridge, 215 Va. 338, 341, 210 S.E.2d 145, 147 (1974); note 2 *supra.*

35. *See* note 14 *supra.*

36. *Compare* text accompanying note 14 *supra with* note 33 *supra.*

37. 281 Md. at 567, 380 A.2d at 614.

38. The *Harris* court recited the facts of several cases from other jurisdictions but expressly refused to approve or disapprove their characterization of the defendant's conduct. *Id.* at 568-69, 380 A.2d at 615. The cases cited included: Paris v. Division of State Compensation Ins. Funds, 517 P.2d 1353 (Colo. App. 1973) (supervisor sending plaintiff a letter of reprimand stating, "You must realize that your job was created for you because of your handicap" held not extreme and outrageous conduct); Pakos v. Clark, 253 Or. 113, 453 P.2d 682 (1969) (police officer telling plaintiff that he was crazy as a bedbug and would be put back into an asylum and his children taken away from him held not extreme and outrageous conduct); Medlin v. Allied Inv. Co., 217 Tenn. 469, 398 S.W.2d 270 (1966) (mortgage lender being abusive and insulting to plaintiff homeowner and wrongfully undertaking to foreclose his property held not extreme and outrageous conduct); Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963) (abusive, insulting, and deceitful language held not extreme and outrageous).

> "to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind."[39]

Without expressly adopting any standard, the *Harris* court implicitly approved the *Restatement* position that extreme and outrageous conduct is conduct that so exceeds all possible bounds of decency that it may be regarded as atrocious and utterly intolerable in a civilized community.[40]

Although certain conduct may not normally be characterized as extreme and outrageous, the *Harris* court noted that the presence of two special factors militates in favor of characterizing the defendant's conduct as extreme and outrageous. First, the court stated that conduct is more readily labeled extreme and outrageous if it is undertaken with actual knowledge that the plaintiff is "'peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity.'"[41] Second, the defendant's conduct will be "carefully scrutinized" if his ability to inflict mental distress is enhanced by his special relationship with the plaintiff.[42]

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39. 281 Md. at 567, 380 A.2d at 614 (quoting RESTATEMENT (SECOND) OF Torts § 46, Comment d (1965)). To emphasize this point, the court also stated that "[a]gainst a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be . . . ." 281 Md. at 568, 380 A.2d at 615 (quoting Magruder, *supra* note 25, at 1035).

The importance of this objective limitation on liability should not be overlooked. It is the defendant's conduct that is the crucial element of the tort, and liability will not be imposed unless the defendant's conduct can objectively be considered extreme and outrageous. In Curnett v. Wolf, 244 Iowa 683, 57 N.W.2d 915 (1953), liability was imposed for the intentional infliction of emotional distress when the defendant placed a single telephone call to the plaintiff and threatened to give an unfavorable recommendation to the plaintiff's new employer. *Curnett* has been criticized for failing to apply the limitation that the defendant's conduct must objectively be determined to be extreme and outrageous. *See* Note, *An Independent Tort Action for Mental Suffering and Emotional Distress*, 7 DRAKE L. REV. 53, 62-64 (1957).

40. 281 Md. at 567, 380 A.2d at 614 (citing RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965)).

41. 281 Md. at 567, 380 A.2d at 615 (quoting RESTATEMENT (SECOND) OF Torts § 46, Comment f (1965)). Comment f further provides:

> The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.

42. 281 Md. at 569, 380 A.2d at 615. *See also* Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 495-96, 468 P.2d 216, 218-19, 86 Cal. Rptr. 88, 90-91 (1970) (employer-employee relationship). The RESTATEMENT (SECOND) OF TORTS § 46, Comment e (1965) provides

Thus, if either factor is present, conduct that normally would not be sufficiently opprobrious to satisfy this element of the tort could be considered extreme and outrageous. In determining whether conduct is extreme and outrageous, however, Chief Judge Murphy warned that courts should not scrutinize the defendant's conduct in a sterile setting,[43] as it would be inappropriate to evaluate only the nature of the defendant's conduct and ignore the context of the surroundings in which the conduct occurred. Rather, the totality of the circumstances must be considered, and an attempt should be made to gain some insight into the behavioral interaction of the parties by considering the personality and conduct of the plaintiff as well.

Although the court expressly refused to decide whether Jones' conduct could be considered extreme and outrageous,[44] had that issue been before it, it would seem that both of these special factors were present and would have been relevant to an analysis of whether Jones' conduct was extreme and outrageous. First, even though the grievance complaints filed by Harris provided Jones with actual knowledge that his behavior was causing Harris to suffer mental distress, Jones refused to stop his harassing behavior. Instead, armed with that knowledge, Jones focused his attack on Harris' peculiar speech impediment and his susceptibility to nervous disruption. In addition, Jones' supervisory position apparently would have triggered "careful scrutiny" of his behavior.[45] Due to economic need, Harris could not escape the taunting by quitting his job, and this enhanced Jones' ability to inflict mental distress.

As the *Harris* court warned, however, even if both special factors are applicable, the defendant's conduct should not be characterized as extreme and outrageous without first considering the entire setting in which the conduct occurred.[46] For instance, Harris and Jones worked at a General Motors assembly plant along with many "tough guys."[47] In this assembly-line environment, roughhousing, profanity, and name-calling were common occurrences among the employees, and Harris testified that he would be more nervous than usual after a generally bad day on the job. Perhaps most

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that "[t]he extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests."

43. 281 Md. at 568, 380 A.2d at 615. The *Harris* court quoted with approval from Prosser, *supra* note 29, at 887: "There is a difference between violent and vile profanity addressed to a lady, and the same language to a Butte miner and a United States Marine."

44. The court stated: "While it is crystal clear that Jones' conduct was intentional, we need not decide whether it was extreme or outrageous . . . ." 281 Md. at 570, 380 A.2d at 616.

45. *See also* Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (recognizing higher level of judicial scrutiny when an employer-employee relationship exists).

46. *See* note 43 and accompanying text *supra*.

47. 281 Md. at 563, 380 A.2d at 612.

importantly, Harris admitted at trial that co-workers other than Jones mimicked his stutter and made fun of him; his problems with supervisors had been chronic; and "bosses" in general made him nervous.[48] Harris had been suspended from work ten or twelve times as a result of his chronic problems with "bosses," and after one such suspension had threateningly followed a supervisor home on his motorcycle.[49] One instance of friction between Jones and Harris occurred when Harris crumpled a cigarette package and flagrantly threw it on the floor in front of Jones. When Jones asked Harris to pick it up, Harris responded that it was not his job as he was not a janitor.[50] Jones then mocked Harris' stutter and Harris filed a grievance complaint. Therefore, it is possible that Jones' conduct may not have been extreme or outrageous in the context in which it occurred and may have resulted in part from Harris' instigation. Harris had acquiesced in behavior of others that was identical to that of the defendant, had exhibited an inherent hostility to an entire class of people of which Jones was a member, and had engaged in behavior that arguably was inflammatory. In such circumstances, courts should be hesitant to label a defendant's conduct as extreme and outrageous.

The second element of the tort is that the defendant's conduct must be intentional or reckless. Although stating that "it was crystal clear that Jones' conduct was intentional,"[51] the *Harris* court apparently recognized that a defendant may also be liable for the reckless infliction of emotional distress. According to the court, a

> defendant's conduct is intentional or reckless where he desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct; or where the defendant acts recklessly in deliberate disregard of a high degree of probability that the emotional distress will follow.[52]

This potentially broader formulation of liability has been expressly rejected by at least one court,[53] but although some may argue that imposing liability for the reckless, rather than intentional, infliction of emotional distress unduly extends liability by including conduct that unintentionally inflicts harm, the possibility of an unwarranted extension of liability is diminished by the interaction of the recklessness standard with the extreme and outrageous conduct element of the tort. The state of mind with which a

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48. *Id.*

49. *Id.*

50. Joint Record Extract at 67-68, Jones v. Harris, 35 Md. App. 556, 371 A.2d 1104, *aff'd*, 281 Md. 560, 380 A.2d 611 (1977).

51. *See* note 4 *supra*.

52. 281 Md. at 567, 380 A.2d at 614.

53. Alsteen v. Gehl, 21 Wis. 2d 349, 257-58, 124 N.W.2d 312, 317 (1963) (court stated that recklessness standard was essentially the same as the gross negligence standard which it previously had abandoned as a basis for liability).

defendant inflicts mental distress should be an important factor in determining whether his conduct was extreme and outrageous. In some situations, the decision whether the conduct was extreme and outrageous will be a close one. Presumably, conduct that was actually intended to inflict harm in such a situation could be more egregious than reckless conduct having the same effect. Thus, the fact that the conduct was reckless rather than intentional may be a mitigating factor in determining whether the conduct was extreme and outrageous.[54]

The third element of the tort is that a plaintiff must show a causal connection between the defendant's behavior and the harm suffered by the plaintiff, a requirement that is not unique to the tort of intentional infliction of emotional distress. What is troublesome about this application of the causation element, however, is the fact that the chain of causation must be traced through the plaintiff's psyche.[55] Because it is difficult to verify whether the defendant's conduct actually caused the mental condition alleged to have occurred, courts have employed a reasonable person standard, which prevents the imposition of liability unless a person with reasonably well-developed personality defenses would have suffered severe emotional distress as a result of the defendant's conduct.[56] The *Restatement (Second) of Torts* provides that "[t]he law intervenes only where the distress

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54. *See* Vance v. Vance, No. 78-384 (Md. Ct. Spec. App. Jan. 11, 1979), discussed in note 23 *supra*. This may be so especially if the defendant has knowledge that the plaintiff is peculiarly susceptible to emotional distress. "'The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. It must be emphasized . . . that major outrage is essential to the tort . . . .'" Harris v. Jones, 281 Md. at 567, 380 A.2d at 615 (quoting RESTATEMENT (SECOND) OF TORTS § 46, Comment f (1965)).

55. Prior Maryland cases have discussed when expert testimony is necessary to establish a causal connection between a defendant's conduct and the harm allegedly suffered by a plaintiff. Generally, expert testimony is not required unless the chain of causation between the defendant's behavior and the plaintiff's mental condition is attenuated and not readily apparent to laymen. *Compare* Tully v. Dasher, 250 Md. 424, 244 A.2d 207 (1968) (expert testimony not required to establish existence of headaches and upset stomach following false arrest) *and* Wilhelm v. State Traffic Safety Comm'n, 230 Md. 91, 185 A.2d 715 (1962) (expert testimony unnecessary if alleged injuries follow defendant's negligence closely in time, and connection is clearly apparent from the injury itself) *with* Montgomery Ward & Co. v. Cooper, 248 Md. 536, 237 A.2d 753 (1968) (expert medical testimony necessary to demonstrate that accident caused psychological illness manifested by extreme tension and nervousness) *and* Prince George's County v. Timmons, 150 Md. 511, 133 A. 322 (1926) (expert medical testimony necessary to demonstrate that brain concussion could cause depression).

56. *See, e.g.*, Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899) (hysterical reaction at seeing man dressed in women's clothing not reasonable); Oehler v. L. Bamberger & Co., 4 N.J. Misc. 1003, 135 A. 71 (Sup. Ct. 1926) (stroke is not a reasonable response following threat of arrest for failure to pay for vacuum cleaner), *aff'd by an equally divided court*, 103 N.J.L. 703, 137 A. 425 (Ct. Err. & App. 1927). *See also* Aronoff v. Baltimore Transit Co., 197 Md. 528, 80 A.2d 13 (1951) (no recovery for mental distress resulting from fear or shock following damage to one's property).

inflicted is so severe that no reasonable man could be expected to endure it,"[57] and a number of courts have sustained a defendant's demurrer by assuming the truth of a plaintiff's allegations and concluding that such behavior would not cause a reasonable person to suffer severe emotional distress.[58]

The question of causation is particularly difficult when, as in *Harris*, a plaintiff alleges that a preexisting nervous condition is exacerbated by the defendant's conduct. The *Harris* court noted that in such a case a plaintiff is not prevented from recovering compensation simply because he has a preexisting susceptibility to emotional distress, as long as he can demonstrate that the defendant's conduct intensified that preexisting condition.[59]

The fourth element of the tort is that the plaintiff must suffer severe emotional distress. Traditional tort law will impose liability if the harm to a legally protected interest exceeds the de minimis level, but liability cannot be imposed under the tort of intentional infliction of emotional distress unless the harm to a plaintiff's emotional well-being is "severe."[60] Although

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57. RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965). The distress, however, does not have to be a reasonable reaction to the defendant's conduct if the plaintiff can show that the defendant knew of the plaintiff's peculiar susceptibility to suffering distress and played upon that susceptibility. Comment j further provides that "[t]he distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the *actor has knowledge.*" *Id.* (emphasis added). *See* W. PROSSER, *supra* note 18, § 12, at 59.

58. *See, e.g.*, March v. Cacioppo, 37 Ill. App. 2d 235, 185 N.E.2d 397 (1962) (garnishment of bank account based on void or exorbitant cognovit judgment would not produce severe emotional disturbance in person of ordinary sensitivities); *cf.* Swanson v. Swanson, 12 Ill. App. 3d 163, 257 N.E.2d 194 (1970) (nervousness, sleepless nights, and fear of nightmares from defendant's refusal to inform plaintiff of his mother's death not severe distress). A finding that defendant's conduct is not extreme and outrageous must be implicit in such cases.

59. 281 Md. at 570 n.2, 380 A.2d at 616 n.2. The Court of Special Appeals held that Harris failed to establish that Jones' conduct caused any emotional distress. 35 Md. App. at 570-71, 371 A.2d at 1111-12. Although Harris attempted to establish that his temporary separation from his wife was caused by Jones' conduct, his wife's testimony established that the separation occurred prior to the incidents between Harris and Jones. Harris also attempted to attribute his drunken behavior at a christening to Jones' acts, but the court concluded that Harris had conducted himself in a similar manner prior to his encounters with Jones and that any connection between Jones' harrassment and Harris' behavior at the christening was purely speculative. *Id.* at 571, 371 A.2d at 1112. This conclusion was reinforced by the fact that Harris had received medical treatment for a nervous condition before Jones' harrassment began. Thus, Harris' single visit to his family doctor during the period of his encounters with Jones, "unaccompanied by medical evidence tending to establish that the medical treatment described by Harris flowed as a direct consequence of the Jones activities, ma[de] the connection a matter of the purest conjecture." *Id.*

60. "The severity of the emotional distress is not only relevant to the amount of recovery, but is a necessary element to any recovery." 281 Md. at 570, 380 A.2d at 616. Logically, if recovery is premised on the existence of "severe" emotional distress, it

emotional distress could include everything from fright, grief, and embarrassment to mental or nervous shock,[61] the *Harris* court essentially defined severe emotional distress as a "*severely* disabling emotional response to the defendant's conduct."[62] As may be gleaned from the court's quotation of other sources, one purpose for requiring severe emotional distress is to prevent the imposition of liability for emotional responses that result from trivial affronts, mere rudeness, or bad manners. "'Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people.'"[63] Thus, according to the court's analysis, recovery should be allowed only if the distress is so "'severe that no reasonable man could be expected to endure it.'"[64]

The requirement that the distress must be severe is illustrated by the court's evaluation of the evidence presented by Harris at the trial to establish his emotional distress. This evidence consisted primarily of Harris' subjective testimony that Jones' conduct aggravated his preexisting nervous condition and speech impediment.[65] Although Harris sought to establish that Jones' behavior contributed to a two-week separation between Harris and his wife, it was clear from the wife's testimony that they separated several months prior to Harris' first encounter with Jones.[66] The only objective evidence presented by Harris was that he was treated once by his physician during the period of friction with Jones and medication was prescribed for his nerves. Harris admitted, however, that he had received

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would seem that in every successful action under the tort the jury must return a substantial compensatory damage award. However, a relatively meager award may simply indicate that the jury encountered great difficulty in translating plaintiff's subjective feelings into a monetary amount.

The difficulty of formulating standards that can be used to judge the severity of emotional distress was recognized in Wallace v. Shoreham Hotel Corp., 49 A.2d 81, 83 (Mun. App. D.C. 1946):

> Again we are brought back to placing liability on the seriousness of the mental disturbance suffered by defendant, but with no rule for distinguishing between serious and nonserious distress. . . . [I]f there are no rules or standards by which courts may be guided in determining whether the evidence warrants submitting the case to the jury, and no rules or standards for the jury in determining whether the evidence sustains the charge, then every case of fancied insult and hurt feelings must be submitted to the jury and its verdict must stand.

61. *See* RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).

62. 281 Md. at 570, 380 A.2d at 616 (emphasis in original).

63. *Id.* at 571, 380 A.2d at 616 (quoting RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965)). *See* Knierim v. Izzo, 22 Ill. 2d 73, 85, 174 N.E.2d 157, 164 (1961) (not every emotional reaction is the basis for a cause of action; indiscriminate allowance of actions for mental anguish would encourage neurotic overreactions to trivial injuries).

64. 281 Md. at 571, 380 A.2d at 616 (quoting RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965)). *See* Fletcher v. Western Nat'l Life Ins. Co. 10 Cal. App. 3d 376, 397, 89 Cal. Rptr. 78, 90 (1970).

65. 281 Md. at 572, 380 A.2d at 617.

66. *Id.* at 563, 572, 380 A.2d at 612–13, 617. *See also* note 59 *supra*.

essentially the same treatment from his physician for the six years prior to his encounters with Jones.[67] Harris' wife testified that her husband's nervous condition became worse during his trouble with Jones, and that Harris had "'got to drinking'" at a christening party.[68] Finally, one witness testified that after an encounter with Jones, Harris " 'would be shaken up — that he would be real nervous and walk away.' "[69] The *Harris* court concluded that neither the "intensity and duration" of Harris' distress nor the degree to which his speech impediment had been aggravated had been reflected in the evidence.[70] All that was shown was that Harris was "shaken up" and so humiliated by Jones' harrassment that he felt " 'like going into a hole and hid[ing].' "[71] Drawing all permissible inferences from this evidence in favor of Harris, the court held "that the humiliation suffered was not, as a matter of law, so intense as to constitute the 'severe' emotional distress required to recover for the tort of intentional infliction of emotional distress."[72]

Although the *Harris* court is not alone in requiring severe emotional distress, there is sharp disagreement among the jurisdictions adopting this requirement on the appropriate definition of severe emotional distress. In *Alsteen v. Gehl,*[73] the Supreme Court of Wisconsin articulated perhaps the narrowest definition of severe emotional distress, limiting the application of the phrase "severe emotional distress" to instances in which the plaintiff suffers an "extreme disabling emotional response . . . [so] that he [is] unable to function in his other relationships because of the emotional distress caused by defendant's conduct."[74] Other courts have taken a less restrictive view of the severe emotional distress requirement. As stated by one court, for example, "the recent trend has been to require less severe distress in pleadings and proof than is required in the *Restatement.*"[75] *Moore v. Greene*[76] is illustrative of this less restrictive view. In *Moore,* an attorney

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67. *Id.* Harris' physician did not testify at the trial.

68. *Id.* at 563, 380 A.2d at 613. *See also* note 59 *supra.*

69. Jones v. Harris, 35 Md. App. at 568, 371 A.2d at 1111.

70. 281 Md. at 572-73, 380 A.2d at 617. Presumably, aggravation of a speech impediment would satisfy the "subsequent physical injury" rule that is applied in cases of negligent infliction of emotional distress. Because this rule is not a *sine qua non* of the intentional infliction of emotional distress, *see* note 35 and accompanying tect *supra* & notes 92 & 93 and accompanying text *infra,* it may be assumed that the court's attention to the lack of evidence of an aggravation of the speech impediment was in response to an allegation of such damages contained in Harris' declaration.

71. *Id.* at 572, 380 A.2d at 617.

72. *Id.* at 573, 380 A.2d at 617.

73. 21 Wis. 2d 349, 124 N.W.2d 312 (1963) (court held that recovery not allowed because defendant's conduct was not extreme and outrageous; thus its discussion of the severe emotional distress element was dicta).

74. *Id.* at 360-61, 124 N.W.2d at 318.

75. Newly v. Alto Riviera Apts. 60 Cal. App. 3d 288, 298, 131 Cal. Rptr. 547, 554 (1976) (referring to *Restatement* provision quoted in text at note 57 *supra*).

76. 431 F.2d 584 (9th Cir. 1970).

sued a former client for alleged nonpayment of legal fees after a series of letters sent by the attorney to the client failed to produce payment. In one letter the attorney threatened: " 'You have seen me flay men, Mr. Greene. The instructions herein will be followed literally, or you may expect to be flayed in like degree and with the same permanence.' "[77] The client counterclaimed for intentional infliction of emotional distress. The only evidence presented by the client to substantiate his claim that he had suffered severe emotional distress was subjective testimony such as assertions that the letter made him " 'full of fear and anxiety,' " and that his dealings with the attorney made him " 'a little bit ill.' "[78] The attorney appealed from a jury award in favor of the client, claiming that there was insufficient evidence of severe emotional distress to satisfy that element of the tort, and the Ninth Circuit held that the evidence of severe emotional distress, although "not overwhelming," was sufficient to sustain the jury award.[79]

Harris, Alsteen, and *Moore* illustrate the difficult problems faced by courts in separating the problem of defining severe emotional distress from the distinct but interrelated evidentiary problem of defining the quantum or type of evidence necessary to establish that the plaintiff has suffered such distress.[80] Although they are distinct, both problems reflect continuing attempts by courts to prevent feigned claims by requiring objective corroboration of the distress.[81] *Harris* appears to favor the *Alsteen* definition of severe emotional distress over the *Moore* definition. Both *Harris* and *Alsteen* stated that a plaintiff may not recover under the tort unless he suffers a *severely* disabling emotional response.[82] *Alsteen* required the distress to be so severe that the injured person must be unable to function in his other relationships.[83] Similarly, the *Harris* court stated that the distress

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77. *Id.* at 591 n.4.

78. *Id.* at 591 n.5.

79. *Id.* at 591. Although it is at least conceivable that the court's holding was to some extent influenced by the traditional judicial solicitude for clients in such suits by their attorneys, its opinion did not purport to rely on this factor.

80. In the medical profession, mental distress is defined as a psychic reaction to a traumatic stimulus. A traumatic stimulus is defined as any impact, force, or event that acts upon an individual for a brief or extended period and may be either purely physical, purely psychic, or a mixture of the two. Generally, mental distress elicited by a traumatic response falls into either of two categories: primary or secondary reactions. Primary reactions are of short duration, are difficult to validate objectively, and are usually characterized by such emotional responses as fear, anger, grief, shock, mutilation, or embarrassment. Secondary reactions encompass the more severe psychic responses, and thus are more amenable to objective proof. One type of secondary reaction, the anxiety reaction, is characterized by symptoms such as nausea, weight loss, stomach pains, weakness, and backaches. *See* Comment, *supra* note 25, at 1248-54. *See also* Keschner, *Simulation of Nervous and Mental Disease,* 44 MICH. L. REV. 715 (1946); Rheingold, *The Basis of Medical Testimony,* 15 VAND. L. REV. 473 (1962).

81. *See* notes 18 to 35 and accompanying text *supra.*

82. *See* text at notes 62 & 74 *supra.*

83. *See* text accompanying note 74 *supra.*

must be so severe that a reasonable person cannot be expected to endure it.[84] Moreover, *Harris* appears to reject the *Moore* approach that permitted recovery for distress from which the plaintiff was full of "fear and anxiety" and felt a "little bit ill":[85] the court expressly held that humiliation and being "shaken up" were insufficient to constitute severe emotional distress.[86] Although it may be questioned whether so strict a standard is necessary, the definition enunciated in *Harris* insures that recovery will not be allowed for a trivial distress resulting from conduct that amounts only to rudeness or bad manners.[87] Further, the *Harris* definition of severe emotional distress would appear to be consistent with the court's warning that each element of the tort must be strictly followed in order to minimize the problems of distinguishing the minor from the serious wrong, and the true from the false claim.[88] It may be expected that severe emotional distress will produce more observable symptoms than the minor, transient distress resulting from a trivial wrong.

Once a definition is chosen, however, the difficult question of the quantum or type of evidence necessary to establish the distress must be faced, and it is here that the requirement of objective corroboration to distinguish the true from the false claim is most stringent. The *Harris* court appears to have rejected the *Moore* reasoning that severe emotional distress may be found by the jury solely on the basis of the plaintiff's subjective testimony that he was full of "fear and anxiety."[89] The evidence supporting the plaintiff's claim in *Harris* consisted primarily of Harris' subjective testimony that he was shaken up and that his nervousness had been aggravated. The court characterized this testimony as vague and weak and noted that it was "unaccompanied by any evidentiary particulars," other than a single visit to the doctor, reflecting the "intensity and duration" of the distress.[90] Thus, although the *Harris* court acknowledged that a cause of action would lie for the intentional infliction of emotional distress unaccompanied by physical injury, it failed to provide any guidance with respect to the type of evidence (other than physical manifestations) necessary to establish a purely mental injury other than that the evidence must show the "intensity and duration" of the distress.[91] In contrast, the standard for

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84. *See* text accompanying note 64 *supra*.

85. *See* text accompanying note 78 *supra*.

86. *See* text accompanying notes 71 & 72 *supra*. Compare this conclusion, however, with the conclusion of the *Vance* court discussed in note 23 *supra*. If the *Vance* reasoning remains undisturbed, it appears that it will be easier to establish severe emotional distress when it is negligently inflicted than under the test set out in *Harris* for intentional infliction.

87. *See* notes 62 & 63 and accompanying text *supra*.

88. *See* text accompanying notes 15 & 16 *supra*.

89. *See* notes 78 to 86 and accompanying text *supra*.

90. *See* 281 Md. at 572, 380 A.2d at 617.

91. *See id.* at 565-66, 380 A.2d at 613. Perhaps the only satisfactory evidence, other than evidence of physiological changes, would be evidence that the plaintiff's

determining whether *negligently* inflicted mental distress is compensable in Maryland is defined essentially from an evidentiary perspective. Mental distress is not compensable unless it results in a "clearly apparent and substantial physical injury, as manifested by an external condition or by symptoms clearly indicative of a resultant pathological, physiological, or mental state."[92] Because the issue in the case of either negligent or intentional infliction of mental distress is whether the claim of mental distress can be corroborated, it could be argued that the negligent infliction standard should also be applied to define the scope of protection afforded mental equilibrium from intentional disruption. This, however, would erode any distinction between the intentional and negligent infliction of distress, and would fail to acknowledge that an action for the intentional infliction of emotional distress is permitted without an accompanying physical injury. Indeed, it is quite possible to suffer severe emotional distress without manifesting any observable physical effects of the suffering,[93] and the distinction seems justified because the inference that emotional distress has resulted is clearly stronger in cases of intentional and outrageous conduct than in cases in which conduct is merely negligent.

Objective corroboration of the distress, therefore, should be accomplished by means other than requiring strict evidentiary proof. The *Harris* court's goals of restricting liability to instances of serious wrongs, preventing false claims, and avoiding litigation of claims based on bad manners can be effected by adopting a narrow view of the type of behavior that can be characterized as extreme and outrageous. By focusing on the defendant's conduct, rather than on the degree of harm suffered by a plaintiff, the court can regulate liability by scrutinizing external behavioral interactions rather than a purely internal mental state. As long as the defendant's conduct is shown to be extreme and outrageous, little additional evidence should be required to establish sufficient objective verification that the plaintiff's distress is severe. Extreme and outrageous conduct can be expected to cause severe emotional distress in the reasonable person, and proof that the defendant's behavior fell into this category should be

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normal pattern of conduct and relationships with others had been disrupted. Harris attempted to provide similar evidence. *See* notes 59 & 65 to 69 and accompanying text *supra.*

92. Bowman v. Williams, 164 Md. 397, 404, 165 A. 182, 184 (1933); *see* note 23 *supra.*

93. The RESTATEMENT (SECOND) OF TORTS § 46, Comment k (1965) stresses that subsequent physical injury, although usually present in cases of severe emotional distress, should not be a prerequisite to recovery. *See also* Vanace v. Vance, No. 78-384 (Md. Ct. Spec. App. Jan. 11, 1979), discussed in note 23 *supra;* MD. COM. LAW CODE ANN. § 14-203 (1975) (permitting recovery for emotional distress, whether or not accompanied by physical injury, against debt collectors violating code provisions).

sufficient to establish that severe distress was substantially likely to occur.[94] If the court instead regulates liability by focusing on the degree of harm suffered by the plaintiff, it will leave open the possibility that conduct that is utterly intolerable in a civilized community will go undeterred while the mental suffering produced by such conduct goes unrequited, simply because a plaintiff was unable, or lacked the foresight, to document the existence of that mental distress.[95]

A person engaging in extreme and outrageous conduct for the purpose of inflicting mental distress should not be able to escape liability by claiming that he failed in his objective, nor should his tale of failure be aided by a requirement that the plaintiff overcome strict evidentiary standards regarding proof of mental distress. If courts faithfully refuse to permit a jury to find that a defendant's conduct is extreme and outrageous unless it is truly socially despicable, then the existence of mental distress could be adequately corroborated by looking to the nature of the defendant's conduct and considering the probable effect of that conduct on the ordinary person. The conduct of the defendant is the essence of this tort, and the "extreme and outrageous conduct" element of the tort is the element most suitable for judicial regulation of liability.

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94. *See* W. PROSSER, *supra* note 18, § 12, at 52, 59–60. Comment j of RESTATEMENT (SECOND) OF TORTS § 46 (1965) states: "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."

95. *See generally* Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 379, 397, 89 Cal. Rptr. 78, 90–91 (1970) (unreasonable to expect vivid accounts of emotional distress from an inarticulate plaintiff); Smith, *Problems of Proof in Psychic Injury Cases*, 14 SYRACUSE L. REV. 586, 594 (1965).

Plaintiffs in cases such as *Harris* could have an especially difficult time proving severe distress if they already suffer from some type of nervous condition. The objective, demonstrable manifestations of the preexisting condition could be so severe that any change in the plaintiff's conduct attributable to the aggravation caused by the defendant would not appear appreciably different. Thus, the court should regulate liability by focusing on the outrageousness of the defendant's conduct. Jones' conduct was sufficiently outrageous to provide a guarantee that Harris was substantially likely to suffer distress, and the strength of Harris' testimony of his distress should go to the extent of damages. If the jury does not believe a plaintiff's subjective testimony, it can award essentially nominal damages. Moreover, a judge can counteract an excessive jury award by granting the defendant a remittitur.